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GOVERNMENT-SPONSORED POPULATION POLICIES AND INDIGENOUS PEOPLES: CHALLENGES FOR INTERNATIONAL HUMAN RIGHTS LAW

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Abstract

This paper examines whether indigenous peoples' right to reproductive autonomy can be established from the right to self-determination and to health under international human rights law, and the extent to which their reproductive health rights can be effectively protected against government-sponsored population policies. Historically there have been instances of government population policies targeting specifically or primarily indigenous peoples. This includes the US sterilisation programmes in the 1970s and Australia's removal of Aboriginal children to live with foster white families (1900-1969), as well as in more recent years Peru's family planning programme (1996-2000). The past decade has seen some important developments in this field, in particular the Australian Government's symbolically important 'apology' to the 'Stolen Generation' in 2008, and the proposal for a state Stolen Generations (Compensation) Bill 2014, which, if adopted, could provide a measure of reparation for past policies. At the global level a number of important initiatives on population policies have developed, the most recent being the second international conference on population and development in Cairo in 2014. This paper argues that the right to self-determination, to health and to prior and informed consent, which includes the right to self-government and autonomy, must also include the indigenous right to reject government policies that subject communities to birth control programmes.

Keywords: Indigenous peoples; reproductive health; human rights; population policies

1. INTRODUCTION

As early as the 17th century there were attempts by international lawyers protect indigenous peoples from the massacres of the Spanish conquistadors in the Americas through legal and moral theories deriving from natural law.¹ Yet these pre-positivist

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conceptions of natural law could not withstand the legal positivism of the 19th century since positive international law, in its classical form, was only applicable to States. Hence, indigenous peoples were not considered subjects of international law and were not subject to international legal protection at that time.²

The few remaining guardians of indigenous peoples in the Americas were Christian missionaries such as the Jesuits, whose efforts are viewed as a mixed blessing. They tried to protect the Indians from killing and slavery, but introduced a policy of assimilation, attempting to 'civilise' and 'discipline' them. Since vibrant indigenous cultures were in fact antithetical to the missionaries' aims,³ not only was indigenous peoples' physical existence threatened, but also their cultural survival.⁴

Indigenous peoples have had a tragic history of forced assimilation and deprivation of their lands in many parts of the world. While descendants of European settlers achieved political independence from the colonial powers, indigenous peoples within the former colonies remained the target of discrimination and subject to invasion of their lands ('internal colonialism'⁵). As indigenous peoples did not hold title to land in a way that European legal systems of registration recognised, it was easy for colonial rulers to dispossess them from their ancestral lands. Indigenous tribes were assigned to reservations on marginal land, yet these are rarely sacrosanct even today in light of competing interests of economic operators and national governments.

Regrettably, indigenous cultures are still viewed today by some governments as an anachronistic stage in human development. However, the growth of international human rights law has challenged this view, demanding modernisation of classical international law, so as to place individuals and groups of individuals as beneficiaries of international human rights.⁶ Although neither the Universal Declaration of Human Rights (UDHR), the two 1966 Covenants⁷, the UN Covenant on Racial Discrimination⁸, the

¹ Michael Reisman, 'Protecting Indigenous Rights in International Adjudication', (1995) 89 *American Journal of International Law* 350, 350-362.

² Natan Lerner, 'The 1989 ILO Convention on Indigenous Populations: New Standards?' in Yoram Dinstein and Mala Tabory (eds) *The Protection of Minorities and Human Rights* (Martinus Nijhoff 1991) 213.

³ Particularly by Francisco de Victoria's 'Spanish School of International Law.' See Hurst Hannum, 'The Protection of Indigenous Rights in the Inter-American System' in David J Harris and Stephen Livingstone (eds), *The Inter-American System of Human Rights* (OUP 1998) 323, 343.

⁴ Ironically, the gathering of small villages into larger Indian missions actually made it easier for slave raiders to capture larger numbers of people with less effort. See Capistrano Abreu, *Chapters of Brazil's Colonial History 1500-1800* (OUP 1998).

⁵ Erica-Irene A Daes, 'Protection of the World's Indigenous Peoples and Human Rights' in Janusz Symonides (ed), *Human Rights: Concepts and Standards* (Ashgate 2000) 302; R Pereira and O Gough, 'Permanent Sovereignty over Natural Resources in the 21st Century: Natural Resource Governance and the Right to Self-Determination of Indigenous Peoples under International Law' (2013) 14 (2) *Melbourne Journal of International Law* 1.

⁶ See Richard Falk, 'The Rights of Peoples (in Particular Indigenous Peoples)' in James Crawford (ed), *The Rights of Peoples* (OUP 1992) 18-32.

⁷ See International Covenant on Economic, Social and Cultural Rights (opened for signature on 16 December 1966, entered into force 3 January 1976) GA Res 2200 (XXI) 21 UN GAOR Supp (No 16), UN Doc A/6316; and International Covenant on Civil and Political Rights (opened for signature 19 December 1966, entered into force 23 March 1976) 999 UNTS 171.

⁸ International Convention of the Elimination of All Forms of Racial Discrimination (opened for signature on 21 December 1965, entered into force 4 January 1969) 660 UNTS 195; GA Res 2106 (XX), Annex, 20 UN GAOR Supp (No 14) at 47, UN Doc A/6014.

European,⁹ nor Inter-American human rights instruments¹⁰ refer specifically to indigenous peoples, indigenous peoples' human rights have been developed, in particular, in instruments adopted by the International Labour Organisation and the UN General Assembly.¹¹

This paper focuses on one aspect of post-colonialism: population policies (such as forceful family planning and birth control programmes, including sterilisation programmes). It assesses the extent to which these policies can be invalidated in light of the right to self-determination and to health under international law. This paper argues that the right to 'reproductive self-determination' of indigenous peoples should be recognised as a sub-category of their rights to self-determination and to health under international law. Moreover, this paper argues that government-sponsored population policies must be understood in light of the broader context of State failure to effectively protect indigenous peoples from harm and their land from invasion, which pose a serious threat to the health and long-term survival of indigenous peoples. This paper thus contributes to the literature on indigenous peoples' rights under international human rights law by exploring the limits of their rights to reproductive health and autonomy. In this context, this paper challenges the legality of government-sponsored population policies impacting on indigenous peoples' rights, a field which has been understudied from the perspective of international human rights law. Given that the long-term survival and generational continuity of distinctive indigenous groups depend on the effective protection of their reproductive rights, this is a crucial area for study from the perspective of international human rights law.

The second section of the paper discusses estimates of indigenous populations worldwide, and the related problem of defining an 'indigenous identity' that could guide population policies, including government-sponsored family planning programmes. The third section presents an overview of international developments that have led to forceful birth control programmes being imposed upon indigenous peoples, with particular focus on Australia and Peru. It is argued that these past and contemporary policies suggest that indigenous peoples are particularly vulnerable to the impacts of national population control programmes. The fourth section assesses the extent to which substantive norms recognising a human right to self-determination, to health and to reproductive health have been elaborated in international human rights law, which provide the legal basis for the right to 'reproductive autonomy'. The fifth section analyses the procedural guarantees and remedies available for indigenous peoples to assert their reproductive autonomy, in particular the rights to prior and informed consent and to participation in decision-making. Further, it discusses the international, regional and national judicial and extra-judicial avenues for the condemnation of and for reparations for forceful interventions in

⁹ European Convention on Human Rights (adopted on 04 November 1950, entered into force 03 September 1953) ETS 5; 213 UNTS 221.

¹⁰ See for example, Organisation of American States, American Convention on Human Rights (adopted on 21 November 1969, entered into force 18 July 1978) OAS Treaty Series No 36; 1144 UNTS 123; 9 ILM 99.

¹¹ See UN Declaration on the Rights of Indigenous Peoples, GA Res 61/295, UN GAOR, 61st Sess, 107th plenary meeting, Agenda Item 68, Supp No 49, UN Doc A/RES/61/295 (2 October 2007) annex ('United Nations Declaration on the Rights of Indigenous Peoples'); Convention (No 169) Concerning Indigenous and Tribal Peoples in Independent Countries (opened for signature 27 June 1989, entered into force 5 September 1991) 1650 UNTS 383 ('ILO Convention 169'). See also Pereira and Gough (n 5).

indigenous reproductive affairs. This paper finally concludes that a rights-based approach, as established by the right to self-determination, to health and to prior and informed consent under international law, provide the essential legal basis for the protection of indigenous peoples' reproductive autonomy.

2. POPULATION POLITICS AND THE INDIGENOUS ETHNIC AND CULTURAL IDENTITY

Recent estimates have suggested that there are around 370 million indigenous people worldwide, equating to just under 6 per cent of the world's total population.¹² This includes at least 5,000 distinct indigenous peoples in over 72 States.¹³ A considerable majority of indigenous peoples (260 million) are from Asia (China, South Asia, the former Soviet Republic and Southeast Asia).¹⁴ There are approximately 40 million indigenous people in Latin America and the Caribbean (who belong to almost 600 distinct indigenous peoples groups).¹⁵ It has been further estimated that there are around 50 million indigenous peoples in Africa.¹⁶

In the US it was estimated in 2010 that there are approximately 5.2 million indigenous people (or 1.6 per cent of the total population).¹⁷ A 2011 National Household Survey estimated that the indigenous population of Canada is just over 1.4 million (representing 4.3 per cent of the total Canadian population).¹⁸ There are approximately

¹² Framework of Actions for the follow-up to the Programme of Action of the International Conference of Population and Development Beyond: Report of the Secretary General, UN A/69/62 (12 February 2014) <http://icpdbeyond2014.org/uploads/browser/files/93632_unfpa_eng_web.pdf at 59> accessed 10 February 2015. UN Secretariat, Department of Economic and Social Affairs, *Rethinking Poverty: Report on the World Social Situation 2010* (see also International Work Group for Indigenous Affairs (IWGIA) *Who are indigenous peoples?* <<http://www.iwgia.org/culture-and-identity/identification-of-indigenous-peoples>> accessed 10 February 2015 Sales No E.09.IV.10). See also Stidsen D Vinding (ed), *The Indigenous World 2005. The Indigenous World* (2005) (Copenhagen International Work Group on Indigenous Affairs); and Carolyn Stephens, Clive Nettleton, John Porter, Ruth Willis, and Stephanie Clark, 'Indigenous Peoples' Health – Why are they behind everyone, everywhere?' (2005) 366 *The Lancet* 9479, 11.

¹³ Cacilie Mikkelsen (ed), *The Indigenous World 2014* (IWGIA, Copenhagen 2014) 11, <http://www.iwgia.org/iwgia_files_publications_files/0671_I2014eb.pdf> accessed 15 February 2015. See also Office of the High Commissioner for Human Rights, 'Indigenous Peoples and the United Nations System' (Office of the High Commissioner for Human Rights, UN Office at Geneva, 2001); Sadruddin Aga Khan and Hassan Bin Talal, *Indigenous Peoples: A Global Quest for Justice* (Zed Books 1987); and International Work Group for Indigenous Affairs (IWGIA), *Who are indigenous peoples?* <<http://www.iwgia.org/culture-and-identity/identification-of-indigenous-peoples>> accessed 10 February 2015.

¹⁴ Cacilie Mikkelsen (n 13); International Work Group for Indigenous Affairs (IWGIA), 'The Indigenous World – Asia' <<http://www.iwgia.org/regions/asia>> accessed 10 February 2015.

¹⁵ Cacilie Mikkelsen (n 13). See also IWGIA, 'Indigenous Peoples in Latin America' <<http://www.iwgia.org/regions/latin-america/indigenous-peoples-in-latin-america>> accessed on 10 February 2015.

¹⁶ *ibid.* See also IWGIA, 'Indigenous Peoples in Africa' <<http://www.iwgia.org/regions/africa/indigenous-peoples-in-africa>> accessed on 10 February 2015.

¹⁷ Federal Register 78 (87) 26384-26389. 2 US Census 2012. The American Indian and Alaska Native Population: 2010. See further, Cacilie Mikkelsen (n 13) 54.

¹⁸ National Household Survey, 'Statistics Canada: Aboriginal Peoples of Canada: First Nations People, Metis and Inuit 2011' <<http://www12.statcan.gc.ca/nhs-enm/2011/as-sa/99-011-x/99-011-x2011001-eng.cfm>> accessed 10 February 2015. See further *The Indigenous World 2014* (n 13) 44.

670,000 indigenous peoples in Australia, or 3.0 per cent of the total population.¹⁹ In New Zealand, the Māori represent 15 per cent of the total population of 4.3 million.²⁰ Yet it should be noted that indigenous peoples do not always form part of minority groups within States. While, for example, indigenous peoples account for only 0.45 per cent of the population of Brazil, Latin America's largest country, they account for the majority of the total population of Bolivia.²¹ With a total of over 15 million indigenous peoples, Mexico has the highest indigenous population in absolute numbers in the Americas.²²

The demographic survival of indigenous peoples is continually threatened by repression, dispossession of their lands and, the so-called 'McNeill effect',²³ that is the transmission of diseases arising from the contact of indigenous peoples with white colonial rulers. Despite these challenges, it has been suggested that the indigenous population in some parts of the world is recovering. The Programme for Action of the International Conference on Population and Development ('ICPD') 1994 stated that:²⁴

In some regions of the world, indigenous people, after long periods of population loss, are experiencing steady and in some places rapid population growth resulting from declining mortality, although morbidity and mortality are generally still much higher than for other sections of the national population. In other regions, however, they are still experiencing a steady population decline as a result of contact with external diseases, loss of land and resources, ecological destruction, displacement, resettlement and disruption of their families, communities and social systems.

Latin America and the Caribbean, for example, present a picture of population recovery. Citing several authoritative studies, Montenegro and Stephens provide the following figures:

The estimated total population of indigenous peoples before European invasion ranged from 52.9 to 150 million ... Within 100 years, the estimated total Indigenous populations dropped... to 11 million. [Henceforth] in the 18th Century Indigenous populations represented merely 1.6% of the total

¹⁹ Australian Bureau of Statistics, 3101.0 - Australian Demographic Statistics (March 2012) <<http://www.abs.gov.au/AUSSTATS/abs@.nsf/featurearticlesbyCatalogue/DB52AB9278B0C818CA257AD7000D1067?OpenDocument>> accessed 10 February 2015; Cacilie Mikkelsen (n 13) 216.

²⁰ *Statistics New Zealand* <<http://www.stats.govt.nz>> accessed 10 February 2010, 223; Cacilie Mikkelsen (n 13) 223.

²¹ See *The Indigenous World 2014* (n 13) 176. Similar high indigenous populations are found in Peru, Mexico, Guatemala and Ecuador. See also Raul A Montenegro and Carolyn Stephens, 'Indigenous Health in Latin America and the Caribbean' (2006) 367 *The Lancet* 1859, 1860.

²² Cacilie Mikkelsen (n 13) 66. See the National Institute for Statistics, Geography and Computing (INEGI) which conducted the 13th Census of Population and Housing. It indicates that there are a total of 15,703,474 indigenous people in the country. See also Universidad Nacional Autonoma de Mexico, *¿Cuántos indígenas habitan en la República Mexicana?* <http://www.nacionmulticultural.unam.mx/100preguntas/pregunta.php?num_pre=5> accessed 15 February 2015; and Ministry of the Interior, Programa Sectorial de Gobernacion 2013-2018, *Diario Oficial de la Federacion*, Mexico (12 December 2013) 14.

²³ Named after William McNeill, *Plagues and Peoples* (Anchor Press/Doubleday 1976) who studied the impact of diseases on the history of civilizations. See also Montenegro and Stephens (n 21).

²⁴ UN Population Fund, Programme of Action of the 1994 ICPD (6.21) A/CONF.171/13/Rev.1, Report of the International Conference on Population and Development, UNFPA 1995 <<http://www.unfpa.org/public/home/publications/pid/1973>> accessed 10 February 2015.

population. However, some demographic recovery seems to have taken place: in 1960, the total Indigenous population of Latin America and the Caribbean was estimated as 14.1 million; by 2003 it was more than 48.4 million.²⁵

Nevertheless, they point out that even though the total indigenous population may have recovered, there are fewer distinct groups.²⁶ For example, in Brazil the total number of indigenous groups is estimated to have fallen from around 1,000 (in the 17th Century) to 222 in 2006.²⁷ It has been suggested that the development of *self*-definition of 'indigeneity' may help explain the apparent recovery in population numbers in some parts of the world.²⁸ Indeed, estimates of indigenous populations vary according to the way 'indigeneity' is defined and measured, and depends on the extent to which indigenous peoples distinguish themselves from the rest of the population. In this vein, it is their distinctive language that has been used to define 'indigeneity' in most census counts.²⁹ Language is a paramount means of self-identification and group-identification, and in Latin America alone there are roughly 400 different indigenous languages.³⁰ On the other hand, it has been suggested that official census estimates of indigenous populations in some countries is likely to be distorted given that discrimination can lead to underreporting of indigenous identity.³¹ Hence, the way in which 'indigeneity' is defined and measured has a major impact on estimates of indigenous populations, and will ultimately influence national policies of fertility control.³²

The subject of population politics has become a taboo for much of the past century, not least because of practices such as sterilisation and other controversial birth control programmes as discussed in this paper. Malthus claimed in 1798 that population growth

²⁵ Montenegro and Stephens (n 21) 1860-1861. See also Chaunu, *Conquete et Exploitation des Nouveaux Mondes (XVIeme Siecle) Nouvelle Clio. L'Histoire et ses Problemes* (Presses Universitaires de France 1969).

²⁶ *ibid.*

²⁷ *ibid.*

²⁸ *ibid.*

²⁹ *ibid.*

³⁰ World Bank. 'Indigenous People in Latin America' HRO Dissemination Notes No 8 (June 7, 1993). Human Resources Development and Operations Policy (1993); and M L Gonzales (1994). 'How Many Indigenous People?' in G Psacharopoulos and H A Patrinos (eds), *Indigenous People and Poverty in Latin America: An Empirical Analysis*. Washington, DC: The World Bank <<http://documents.worldbank.org/curated/en/1994/09/438861/indigenous-people-poverty-latin-america-empirical-analysis>> accessed 15 February 2015.

³¹ For example, although recent official census statistics have suggested that 41% of the population of Guatemala is indigenous (despite the greater rates of fertility among indigenous peoples), some NGOs have suggested that this data is contentious in that discrimination may lead to underreporting of indigenous identity in census counts. See Health Poverty Action, *Every Mother Counts: Reporting Health Data by Ethnicity* (May 2013) 22 ('Every Mother Counts') <<http://www.healthpovertyaction.org/wp-content/uploads/downloads/2013/05/Every-mother-counts-report.The-case-for-disaggregating-data.pdf>> accessed 10 February 2015.

³² Yet, at present, there is no widely accepted definition of 'indigenous peoples' under international law. UN practice has been largely guided by a working definition provided by the UN Special Rapporteur Jose R Martinez Cobo in a 1986 report. Special Rapporteur, Jose R Martinez Cobo, 'Study of the Problem of Discrimination Against Indigenous Populations' UN Doc E/CN.4/Sub.2/1986. See also, Russel Lawrence Barsh, 'Indigenous Peoples: An Emerging Object of International Law' (1986) 80 *American Journal of International Law* 369, 385.

would outstrip food supplies,³³ leading to a continued debate as to the extent to which government intervention is necessary to control population growth. While Cordorcet claimed in 1795 that targeted and voluntary change in reproductive behaviour could lead to a reduction in population growth,³⁴ post-Malthusians have claimed that State intervention (if necessary via coercive methods) was required to control population growth.³⁵

The food crisis in 2008 led to a degree of scepticism in the post-Malthusian theory that technological development would invariably match any deficiencies in food supplies, and thus challenges the idea that population growth would not inevitably outstrip food supplies due to changes in technological development.³⁶ Moreover, concerns over climate change and migration have led to a recurrent debate on global population policies. In this regard, although it was rejected on evidentiary grounds, the petition submitted before the Inter-American Commission of Human Rights by the Inuit Peoples against the US Government³⁷ for its green house gas emissions provides an indication of how States may be held accountable for the dislocation of indigenous populations due to the impacts of climate change.³⁸ There is also litigation before US courts in which indigenous peoples rights are implicated in the context of climate change.³⁹

Population policies have tended to be top-down and based on aggregated national targets and goals, disregarding the particular situation of indigenous peoples. The UN Millennium Development Goals (MDGs) are based on comprehensive targets and numbers at national and international levels.⁴⁰ So in the 1994 ICPD there was consensus that States needed to ‘shift emphasis from a top-down imposition of population control

³³ See Thomas Malthus, *An Essay on the Principle of Population* (first published in 1798, republished OUP 2008).

³⁴ See Marquis de Condorcet, ‘Esquisse d’un tableau historique des Progres de L’Esprit Humain’ (1795[1968]) In *Ceuvres de Condorcet* vi 256. This view was generally accepted by Thomas Malthus (n 33).

³⁵ See further Shalini Randeria, ‘Malthus versus Condorcet: Population Policy, Gender and Culture from an Ethnological Perspective’ in S Berking and M Zolkos (eds), *Between Life and Death: Governing Populations in the Era of Human Rights* (Peter Lang 2009) 28-29.

³⁶ See Malthus (n 33). Indeed, the global food crisis in 2008 which has arisen from the food shortages and the hiking of prices of a great number of agricultural commodities has been largely blamed on the increasing global demand for biofuels and consequent exhaustion of agricultural lands to meet this global demand. See also Ricardo Pereira ‘The Right to Reproductive Self-Determination of Indigenous Peoples under Human Rights Law’ in Sabine Berking and Magdalena Zolkos (eds), *Between Life and Death: Governing Population in an Era of Human Rights* (Peter Lang 2009).

³⁷ Sheila Watt-Cloutier, *Petition Seeking Relief from Violations Resulting from Global Warming caused by Acts or Omissions of the United States* (December 2005) <<http://www.inuitcircumpolar.com/files/uploads/icc-files/FINALPetitionICC.pdf>> accessed 10 February 2015.

³⁸ See eg Randall S Abate and Elizabeth Ann Kronk (eds), *Climate Change and Indigenous Peoples: the Search for Legal Remedies* (Edward Elgar 2013).

³⁹ See in particular *Native Village of Kivalina et al v ExxonMobil Corp*, No. 09-17490 (9th Cir. Sept. 21, 2012). See, more generally, BC O’Neill, FL MacKellar, W Lutz, *Population and Climate Change* (CUP 2005); and the Report of the Indigenous Peoples’ Global Summit on Climate Change (20 – 24 April 2009) <<http://www.un.org/ga/president/63/letters/globalsummitoncc.pdf>> accessed 10 February 2015.

⁴⁰ UN General Assembly, *United Nations Millennium Declaration, Resolution Adopted by the General Assembly*, 18 September 2000, A/RES/55/2 please provide full citation. See Carolyn Stephens, John Porter, Clive J Nettleton and Ruth Willis, ‘Disappearing, Displaced and Undervalued: A Call to Action for Indigenous Health Worldwide’ (2006) 367 *The Lancet* 9527, 2019.

measures to community-based programs that better respond to the needs of individuals and families.’⁴¹

Most States monitor progress towards meeting the MDGs targets through aggregate data, therefore the data uses averages from the whole population.⁴² Such nationwide population targets fail to take into account that indigenous peoples are in some instances represented by small numbers. A few deaths within indigenous populations are irrelevant for the attainment of a ‘national target’ of mortality control, but have a significant impact upon groups that are demographically fragile. Therefore, while health indicators can be declining among marginalised communities, the country as a whole may appear to be making steady progress towards meeting a national target.⁴³ Although there has been resistance to disaggregation of data in population and health indicators, in recent years there has been increasing recognition of importance of data disaggregation. In particular, the 2010 MDGs Summit Declaration highlights the importance of taking account of inequalities within countries and the need for countries to have ‘adequate, timely, reliable and disaggregate data’ that can be used to improve policies and programmes.⁴⁴ This position is reiterated in the more recent Framework of Actions of the ICDP 2014 conference (Cairo+20), which had as one its main objectives to assess the implementation of the Programme for Action adopted under the first 1994 international conference on population and development (ICDP).⁴⁵

3. INDIGENOUS PEOPLES AND FORCEFUL BIRTH CONTROL PROGRAMMES

It is widely recognised that there is need for lawful government intervention and programmes of birth control, including the distribution of contraceptives and family planning. The State has a duty to guarantee the health of the population and to ensure that resources are available to future generations, which could be undermined by uncontrolled population growth, especially as the rates of fertility tend to be higher in the poorest parts of the world.⁴⁶ In fact, it has been suggested that reproductive health and access to family planning is a fundamental human right.⁴⁷ Even though reproductive health is not specifically mentioned in the UDHR nor the two 1966 Covenants, it could be seen as

⁴¹ See the Programme of Action of the ICPD (n 24).

⁴² See Every Mother Counts (n 31).

⁴³ *ibid.*

⁴⁴ However, under the 2010 MDG goals there is no call for data disaggregation in terms of ethnicity, only as regards gender and age. See UN General Assembly, *Keeping the Promise: United to Achieve the Millennium Development Goals*, A/RES/65/1 (19 October 2010) para 68. See also, Every Mother Counts (n 31).

⁴⁵ See Framework of Actions for the follow-up to the Programme of Action of the International Conference of Population and Development Beyond (n 12) para 681.

⁴⁶ See Xan Rice, ‘High Birth Rates Threatens to Trap Africa in Cycle of Poverty’ *The Guardian* (London, 1 September 2006) reporting that ‘(...) by 2050 Chad, Mali, Guinea Bissau, Liberia, Niger, Burundi and Malawi are projected to triple in size’ and that ‘Nigeria will have become the world’s fourth biggest country.’ According to the ICDP 2014 Framework of Actions document: ‘Africa’s population is growing the fastest, at an estimated 2.3 per cent per year during the period 2010-2015, a rate more than double that of Asia (1.0 per cent per year). See Framework of Actions for the follow-up to the Programme of Action of the International Conference on Population and Development Beyond (n 12) 204. See also, World Population Prospects: The 2012 Revision <<http://esa.un.org/wpp/>> accessed 10 February 2015.

⁴⁷ See Diana Babor, ‘Population Growth and Reproductive Rights in International Human Rights Law’ (1999) 14 Connecticut Journal of International Law 83, 100.

forming part of the broader right to health as enshrined in those international agreements.⁴⁸ Moreover, other civil and political rights could be invoked to uphold reproductive health and freedom, in particular the right to life,⁴⁹ the prohibition against inhuman and degrading treatment⁵⁰ and the right to private and family life.⁵¹ These rights could be raised to secure safe abortions and childbirth, confidentiality of patients seeking reproductive health services, respect for those living with HIV/AIDS and measures to reduce violence against and trafficking of women.⁵²

However, the principle of non-coercion is open to abuse, for example, where a State or racist practitioners within the State may seek to control an ethnic or social class within its borders (also known as eugenic practices). This could lead to forceful interventions aimed at controlling the population growth of one or more specific communities. This would offend the principle of 'reproductive freedom' defined as 'the individual's choice to reproduce or not to reproduce.'⁵³ Eugenic practices leading to medical and scientific experimentation amount to acts of torture and inhuman and degrading treatment, as recognised under the 1966 International Covenant on Civil and Political Rights.⁵⁴

Indigenous peoples have been targeted by forceful state-sponsored sterilisation and other coercive birth control programmes that violate their reproductive rights. A notorious state-sponsored programme led to the mass sterilisation of nearly 250,000 poor women (the majority of which were indigenous) by the Fujimori Government in Peru between 1996 and 2000.⁵⁵ The Peruvian Congress legalised sterilisation for family planning shortly after Fujimori announced in his second inaugural speech in July 1995 that family planning would be a priority for his Government.⁵⁶ The programme was undertaken in the remote, rural areas of the Andean Sierra and Peruvian Amazon region, which are heavily indigenous.⁵⁷ Although Peru's family planning public policy was officially considered to be part of a voluntary programme, the women underwent sterilisation without a proper consent process and monthly quotas led doctors to forcibly sterilise women.⁵⁸ Moreover, some health workers did not provide women with

⁴⁸ Maja Ericsson, *Reproductive Freedom in the Context of International Human Rights and Humanitarian Law* (Martinus Nijhoff 2000) 183.

⁴⁹ See eg Article 6(1) of the Covenant on Civil and Political Rights adopted by the UN General Assembly Resolution 2200A (XXI) on 19 December 1966 (in force on 23 March 1976), and Article 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, Council of Europe Treaty Series 4.XI. (4 November 1950). See also General Comment No 6 of the UN Human Rights Committee

⁵⁰ See Article 7 ICCPR (n 49).

⁵¹ See Article 8 of the Council of Europe Convention on Human Rights (n 49).

⁵² See Rebecca Cook, Bernard Dickens and Mahmoud Fathalla, *Reproductive Health and Human Rights: Integrating Medicine, Ethics and Law* (OUP 2003) 158-214.

⁵³ See Berta Hernandez, 'To Bear or Not to Bear: Reproductive Freedom as an International Human Right' (1991) 17 Brooklyn Journal of International Law 309.

⁵⁴ Article 7 of the International Convention on Civil and Political Rights states that "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, *no one shall be subjected without his free consent to medical or scientific experimentation*" (emphasis added).

⁵⁵ See Jaime Miranda and Alicia Ely Yamin, 'Reproductive Health without Rights in Peru' (2004) 363 The Lancet 9402, 68-69.

⁵⁶ *ibid.*

⁵⁷ *ibid.*

⁵⁸ *ibid.*, 68.

information regarding other available birth control methods and many times deliberately gave inaccurate information about the risks and consequences of surgical sterilisation.⁵⁹ As put by Jaichand and O'Connell, 'the Peruvian State ultimately viewed family planning as a means to reduce poverty rather than to promote women's rights.'⁶⁰

The Peruvian Human Rights Ombudsman Office played a vital role in documenting gross human rights violations during the implementation of the programme. Yet it was not until President Alejandro Toledo assumed power in 2001 that formal investigations were launched into the reproductive health programme. The findings of the two investigations were that gross violations of women's reproductive rights had taken place and were thus denounced. Further, the Ombudsman Office issued another Report in September 2002,⁶¹ which found that, in the case of sterilisations, local health-care workers were required to meet quotas, creating incentives for coercive and negligent behaviour.⁶²

In another example, the Australian Government's forceful removal of Aboriginal children from their families between 1900 and 1969 breached the fundamental rights of the indigenous populations.⁶³ The 1997 '*Bringing Them Home*' report found that at least 100,000 Aborigines, in particular mixed race children from white and Aboriginal parents, were taken away from their (Aboriginal) parents and placed in the care of institutions, religious missions or white foster families.⁶⁴ The policies were supported by a legal framework particularly disadvantageous to Aboriginal peoples. Until the 1960s, the 'White Australia' policy encouraged white settlement, while a 'protectorate' system was applied to indigenous peoples. This 'protectorate' system prohibited indigenous peoples from marrying and forming families without the consent the State.⁶⁵ Responsibility for Aboriginal affairs, in effect, remained with the former colonies, which became State governments after federation.⁶⁶ Since British colonisation happened with almost no recognition of the existing legal order, Aboriginal peoples were not even counted in the census.⁶⁷ The notion of *terra nullius* was not rejected until 1992 when the Australian

⁵⁹ Jocelyn E Getgen, 'Untold Truths: The Exclusion of Enforced Sterilizations from the Peruvian Truth Commission's Final Report' (2009) 29 Third World Law Journal 12.

⁶⁰ Vinodh Jaichand and Ciara O'Connell, 'Bringing it Home: The Inter-American System and State Obligations using a Gender Approach Regionally to Address Women's Rights Violations Domestically' (2010) 3 Inter-American & European Hum Rights Journal 49, 61.

⁶¹ Defensoria del Pueblo, Informe Defensorial No 69. Lima: Defensoria del Pueblo, November 2002.

⁶² Miranda and Yamin (n 55).

⁶³ See eg Dylan Lino, 'Monetary Compensation and the Stolen Generations: A Critique of the Federal Labor Government's Position' (2010) 14(1) Australian Indigenous Law Review 2, 19; and BBC News, *The Agony of Australia' Stolen Generation* (London, 9 August 2007) <<http://news.bbc.co.uk/1/hi/world/asia-pacific/6937222.stm>> accessed 15 February 2015.

⁶⁴ Human Rights and Equal Opportunity Commission, 'Bringing them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families' (1997) available online from the Reconciliation and Social Justice Library <<http://www.austlii.edu.au/au/other/IndigLRes/stolen/>> accessed 15 February 2015.

⁶⁵ *ibid.*

⁶⁶ Ian Anderson, 'Indigenous Health in Australia, New Zealand, and the Pacific' (2006) 367 The Lancet 1776.

⁶⁷ See Douglas Sanders, 'Self-Determination and Indigenous Peoples' in Christian Tomuschat (ed) *Modern law of Self-Determination* (Martinus Nijhoff, 1993) 59.

High Court delivered the *Mabo v Queensland*⁶⁸ judgment recognising the aboriginal land rights of Torres Strait Islanders.⁶⁹

Other well-documented examples of forceful interference with indigenous peoples' reproductive rights are the US Government-sponsored sterilisation programmes of indigenous women in the 20th century.⁷⁰ In each of the above cases, the dominant society argued that it was acting in the national interest and for the communities' own good, though the indigenous people themselves are dissenters from this view. Other States have tried to control childbirth through coercive programmes, notoriously China's one-child policy (which was recently reformed),⁷¹ and the sterilisation abuses in India in the 1975 'emergency' and the subsequent re-emergence in India of provider targets and disincentive schemes.⁷² These practices are in direct violation of the 1994 International Conference on Population Development⁷³ and the 1995 Beijing World Conference on Women Declaration,⁷⁴ which held non-coercion to be fundamental to population and reproductive health programmes and that 'coercion in any form is unacceptable.'⁷⁵ Forceful child removals are expressly condemned in the 2007 UN Declaration on the Rights of Indigenous Peoples.⁷⁶ Yet according to the 2014 Framework of Actions of the ICDP, a considerably high number of States have not implemented and enforced national laws against coercion, including forced sterilisation.⁷⁷

Reproductive policy should 'address both the socio-economic forces which contribute to high rates of fertility as well as offer comprehensive reproductive health

⁶⁸ *Mabo v Queensland* (no 1) (1988) 166 CLR 186 Australian Law Reports 107; and *Mabo v Queensland* (no. 2) HCA 23; (1992) 175 CLR 1.

⁶⁹ See Sanders (n 67).

⁷⁰ There is an extensive literature on the subject, see for example Mary Dog Crow, *Lakota Woman* (Harper Perennial 1990); B Dillingham, 'American Indian Women and IHS Sterilization Practices' (1977) *American Indian Journal* 3, 16; H Temkin-Greener, SJ Kunitz, D Broudy and M Haffner, 'Surgical fertility regulation among women on the Navaho Indian Reservation, 1972-1978' (1981) *American Journal of Public Health* 71, 403-407; and SJ Torpy, 'Native American Women and Coerced Sterilization: On the Trail of Tears in the 1970s' (2000) *American Indian Culture & Research Journal* 24, 1-2.

⁷¹ The Standing Committee of China's national congress passed a resolution in late 2013 allowing couples to have two children if either parent is an only child. BBC News, 'China formally eases one-child policy' (28 December 2013) <<http://www.bbc.co.uk/news/world-asia-china-25533339>> accessed 10 February 2015.

⁷² See eg Khadija A Turay, 'Population Policy Transition: Human Rights and Population Politics in India during the Emergency and at the Present Moment', in Sabine Berking and Magdalena Zolkos (eds) *Between Law and Death: Population Politics in an Era of Human Rights* (Peter Lang 2009); and more generally, Adrienne Germain, 'Reproductive Health and Human Rights' (2004) 363 *The Lancet* 9402, 65-66.

⁷³ See UN Population and Development Programme of Action adopted at the International Conference on Population and Development, Cairo (New York, UN, ST/ESA/SER.A/149, 1994) para 7.3.

⁷⁴ UN Doc A/CONF.177/20 (1995).

⁷⁵ Babor (n 47) 118.

⁷⁶ See Article 7 para 2: '[i]ndigenous peoples have the collective right to live in freedom, peace and security as distinct peoples and shall not be subjected to any act of genocide or any other act of violence, including forcibly removing children of the group to another group' (emphasis added). Resolution adopted by the General Assembly on 13 Sept 2007, United Nations Declaration on the Rights of Indigenous Peoples 61/295.

⁷⁷ 'Only 60 per cent of countries have promulgated and enforced a national law protecting against coercion, including forced sterilization and forced marriage; this proportion is lowest in the Americas (45 per cent).' See Framework of Actions for the follow-up to the Programme of Action of the International Conference on Population and Development Beyond (n 12) para 317.

care and informed choice for every inhabitant,⁷⁸ but this is antithetical to the use of force. Policies focused on birth quotas and sterilisation inevitably conflict with the basic right of women to decide how many children they will bear. There may be need for limited incentives in order to guarantee the overall effectiveness of family planning programmes - this is particularly so in light to prevent the spread of sexual infectious diseases among indigenous peoples. Yet a state-sponsored practice of forceful sterilisation would most clearly contravene a State's obligations under international human rights law.⁷⁹

While this paper focuses on state-sponsored programmes that violate indigenous peoples' reproductive rights, this is not to say that the problem is limited to indigenous peoples. Women in general and women belonging to minorities groups, in particular, have suffered violations of their reproductive rights in many parts of the globe, including recently the Roma minority in Slovakia and Hungary.⁸⁰ Therefore, the analysis of violations of indigenous peoples' reproductive rights developed in this paper will include a discussion of the international legal mechanisms for protection of women's and minorities' rights in general, including decisions of international and regional courts and treaty-monitoring bodies relating to the protection of reproductive rights. It is pertinent that this paper focuses on the question of indigenous peoples' reproductive rights given the distinctive way in which their human rights have developed under international law. This paper argues that it is fundamental that international law recognises the illegality of practices that violate indigenous peoples' reproductive rights; and establishes effective mechanisms for the prevention of and reparations for past population policies that have breached indigenous peoples' fundamental rights.

4. SUBSTANTIVE RIGHTS IN SUPPORT OF INDIGENOUS PEOPLES' RIGHT TO REPRODUCTIVE AUTONOMY

This section of the paper examines the extent to which certain substantive rights under international law could define the basis for indigenous peoples' reproductive autonomy. It discusses in turn the development of the rights to self-determination, to health, as well as the right to reproductive health, as a sub-category of the right to health.

4.1. INDIGENOUS PEOPLES' RIGHT TO SELF-DETERMINATION UNDER INTERNATIONAL LAW

The right of self-determination could be a powerful basis for securing an element of autonomy and self-government for indigenous and minorities groups (including the right to reproductive health and autonomy). Self-determination allows peoples⁸¹ 'the right, in full freedom, to determine, when as they wish, their internal and external political status,

⁷⁸ Babor (n 47) 118.

⁷⁹ *ibid* at 114.

⁸⁰ See the communication brought before the CEDAW Committee against Hungary, *AS v Hungary* (2006). See UN Committee on the Elimination of Discrimination Against Women, *AS v Hungary*, Communication No. 4/2004, CEDAW/C/36/D/4/2004 (29 August 2006); and the cases before the European Court of Human Rights against Slovakia, *V.C. v Slovakia* [2011], App no 18968/07, decision on 8 November 2011; and *N.B. v Slovakia* [2012], App no 29518/10, 12 June 2012. For a discussion of these cases, see further section 5.2.1 below.

⁸¹ Final Act of the Conference on Security and Cooperation in Europe (1975) 14 ILM 1292, art VIII.

without external political interference, and to pursue as they wish their political, economic, social and cultural development.⁸² Self-determination only emerged as a principle of international law at the San Francisco Conference preceding the draft UN Charter and has been included in both articles 1(2) and 55 of that instrument.⁸³ In addition, an express reference to the right of self-determination can be found in article 1 of both UN 1966 International Covenants on Civil and Political Rights⁸⁴ and Economic, Social and Cultural Rights.⁸⁵ Yet neither the UN Charter nor any other human rights instrument define who the ‘peoples’ entitled to be beneficiaries of self-determination are.⁸⁶ It could be argued that if self-determination in international law is a right accruing to ‘all peoples’ then indigenous people should be recognised as beneficiaries of that right.

Given the legal and political constraints for the recognition of the right to secession (i.e. external self-determination),⁸⁷ it is the right to *internal* self-determination that is more realistically achievable and thus could provide the legal basis against undue interference to the physical well-being and reproductive autonomy of indigenous peoples. James Anaya, the UN Special Rapporteur on Indigenous People between 2008-2014,⁸⁸ signalled that governments have increasingly moved away from the tendency to equate the word self-determination with an absolute right to form an independent state.⁸⁹ Therefore, if external self-determination is not, realistically, available nor politically feasible, the question arises as to whether another form of self-determination can be substituted for its external application.⁹⁰ The UN Human Rights Committee used the term ‘internal self-determination’ for the first time⁹¹ and it is now the terminology followed by most authors referring to forms of self-government, autonomy, territorial integrity or exclusive enjoyment of the indigenous lands and resources.

Significant progress towards the recognition of international rights for indigenous peoples happened with the adoption of UNGA Declaration on the Rights of Indigenous Peoples (UNDRIP) on 13 September 2007, following 20 years of difficult negotiations.⁹²

⁸² Javaid Rehman, *International Human Rights Law: A Practical Approach* (Longman 2003) 325-342.

⁸³ Frederic L Kirgis Jr, ‘The Degrees of Self-Determination in the United Nations Era’ (1994) 88 *American Journal of International Law* 304.

⁸⁴ International Covenant on Civil and Political Rights (adopted and opened for signature, ratification and accession 16 December 1966, entry into force 23 March 1976) GA Res 2200A (XXI) 999 UNTS 171.

⁸⁵ International Covenant on Economic, Social and Cultural Rights (opened for signature on 16 December 1966, entered into force 3 January 1976) GA Res 2200 (XXI) 21 993 UNTS 3 UN GAOR Supp (No 16) at 52, UN Doc A/6316.

⁸⁶ Gudmundur Alfredsson, ‘The Right of Self-determination and Indigenous Peoples’ in Christian Tomuschat (ed), *Modern Law of Self-Determination* (Martinus Nijhoff 1993) 42.

⁸⁷ See generally eg Frederic L Kirgis, ‘The Degrees of Self-Determination in the United Nations Era’ (1994) 88 *American Journal of International Law* 304, 304; Erica-Irene A Daes, ‘Protection of the World’s Indigenous Peoples and Human Rights’ in Janusz Symonides (ed), *Human Rights: Concept and Standards* (UNESCO and Ashgate 2000); and *ibid*.

⁸⁸ He was replaced on June 2014 by Victoria Tauli Corpuz from the Philippines.

⁸⁹ See James Anaya, *Indigenous Peoples in International Law* (OUP 1996) 79, 95. See also, Pereira and Gough (n 5) 470-473.

⁹⁰ Alfredsson (n 86) 54.

⁹¹ Sanders (n 67) 80.

⁹² See UN Declaration on the Rights of Indigenous Peoples, Resolution adopted by the General Assembly 61/295 on 13 September 2007 (‘UNDRIP’). For a commentary on the Declaration, see eg Karen Engle, ‘On Fragile Architecture: The UN Declaration on the Rights of Indigenous Peoples in the Context of Human Rights’ (2011) 22 (1) *European Journal of International Law* 141.

The right to internal self-determination of indigenous peoples is at the heart of the Declaration, which defines it as ‘the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.’⁹³

Although resolutions of the UNGA are not legally binding, given that the UNDRIP was adopted by so many States with so few objections and abstentions, it may very well attain the status of customary international law.⁹⁴ Although Australia, Canada, New Zealand and the US had originally withheld their support for it, those four countries subsequently endorsed the UNDRIP.⁹⁵ Even if not accepted that the UNDRIP could be said to represent customary international law, a number of rights enunciated in it already form part of customary international law.⁹⁶ Indeed, a number of indigenous rights enshrined in the UNDRIP have been recognised by international courts and tribunals as having evolved into customary international law.⁹⁷

Self-government is ‘the overarching political dimension of ongoing self-determination.’⁹⁸ The emergence of values such as democracy and the major notions of cultural and political pluralism have reinforced indigenous claims for governmental and administrative autonomy for their communities, which include claims for reproductive health and generational continuity. The idea in many societies that decisions should be made at the most local level possible reinforces the view that indigenous communities should be able to maintain their traditional decentralised system of governance and to

⁹³ *ibid* UNDRIP, art 4.

⁹⁴ Claire Charters, ‘Indigenous Peoples and International Law and Policy’ (2007) 18 Public Law Review 22, 34.

⁹⁵ The Australian Government ‘endorsed’ the UNDRIP in April 2009: Jenny Macklin, ‘Statement on the United Nations Declaration on the Rights of Indigenous Peoples’ (Press Statement, 3 April 2009) <http://www.un.org/esa/socdev/unpfii/documents/Australia_official_statement_endorsement_UNDRIP.pdf> accessed 15 February 2015. The US Government endorsed the UNDRIP in December 2010: Susan E Rice, ‘Statement by Ambassador Susan E Rice, US Permanent Representative to the United Nations, on the Announcement of US Support for the United Nations Declaration on the Rights of Indigenous Peoples’ (Media Release, 16 December 2010) <<http://usun.state.gov/briefing/statements/2010/153009.htm>> accessed 15 February 2015. This follows from the Canadian Government’s endorsement of the UNDRIP in October 2010 and New Zealand’s in April 2010: Announcement of support for the Declaration on the Rights of Indigenous Peoples, Pita Sharples Minister of Maori Affairs, New Zealand. Presented during the 9th session of the UNPFII, 19 April 2010 - *UN Declaration on the Rights of Indigenous Peoples*, at <[http://www.docip.org/gsdl/collect/cendocdo/index/assoc/HASH01cb/db7dfb1c/455c627c.dir/declarendors_NZ.pdf#search="Pita%20SHARPLES](http://www.docip.org/gsdl/collect/cendocdo/index/assoc/HASH01cb/db7dfb1c/455c627c.dir/declarendors_NZ.pdf#search=)> accessed 15 February 2015; Canada’s Statement of Support on the United Nations Declaration on the Rights of Indigenous Peoples, Statement by John McNee, Canada’s Ambassador to the United Nations, to the president of the UN General Assembly (12 November 2010) press release <<http://www.aadnc-aandc.gc.ca/eng/1309374239861/1309374546142>> accessed 15 February 2015.

⁹⁶ See Engle (n 92) 163; and Karen Engle, *The Elusive Promise of Indigenous Development* (Duke University Press 2010). See also, Pereira and Gough (n 5) 472-473.

⁹⁷ See for example, *Mayagna (Sumo) Awas Tingni Community v Nicaragua*, Inter-American Court of Human Rights (Series C) No 79 (31 August 2001) (‘*Awas Tingni Community*’) para 70. See also Alexandra Xanthaki, ‘Indigenous Rights in International Law over the Last 10 Years and Future Developments’ (2009) 10 Melbourne Journal of International Law 27, 35; and Siegfried Wiessner, ‘Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Analysis’ (1999) 12 Harvard Human Rights Journal 57, 109.

⁹⁸ Anaya (n 89) 99.

make decisions relating to fertility in their communities. In this respect, indigenous peoples should maintain their own institutions of autonomous governance, including their customary and written law and dispute resolution and adjudication mechanisms, which have existed not only *de facto*, but as the indigenous peoples correctly claim, also *de jure*, as recognised in the ILO Convention on Indigenous Peoples no. 169.⁹⁹ In order to give effect to the right to internal self-determination, effective procedural rights must be established under international and national law, including the indigenous right to prior and informed consent (PIC) and to participation in decision-making.¹⁰⁰

International and regional human rights bodies (in particular in the Americas) have played a significant role in recognising indigenous peoples' right to internal self-determination, in particular by recognising the obligation of States to protect indigenous peoples' land and natural resource rights and to respect and protect the values, customs and traditions of indigenous communities.¹⁰¹ Some of the most prominent regional developments are the decisions by Inter-American human rights bodies,¹⁰² which have taken a progressive stance on indigenous peoples' land rights.¹⁰³ For example, in *Sawhoyamaya Indigenous Community v Paraguay* ('*Sawhoyamaya*')¹⁰⁴ the Inter-American Court of Human Rights (IACtHR) ruled that Paraguayan legislation failed to provide an effective judicial remedy that protected legitimate land claims by indigenous communities.¹⁰⁵ This constituted a violation *per se* of the American Convention on Human Rights (ACHR),¹⁰⁶ and the displacement and expropriation of indigenous' lands amounted to a violation of the right to life.¹⁰⁷

Importantly, in *Saramaka People v Suriname*,¹⁰⁸ the IACtHR referred for the first time to the right of self-determination in its interpretation of indigenous land and resource rights under article 21 of the ACHR.¹⁰⁹ Moreover, in the more recent decision of *Kichwa Indigenous People of Sarayaku v Ecuador*,¹¹⁰ the Court found that Ecuador had violated

⁹⁹ Articles 6 and 7, Convention (No 169) concerning Indigenous and Tribal Peoples in Independent Countries (n 11). See also, Pereira 'The Right to Reproductive Self-Determination' (n 37) 314; and Pereira and Gough (n 5) 471.

¹⁰⁰ See ILO Convention 169 (n 11) art 6(2); and UN Declaration on Indigenous Peoples Rights (n 11) art 18 and 19. On the indigenous right to participation and to prior and informed consent, see further section 5.1 below.

¹⁰¹ See for example, Inter-American Commission on Human Rights, 'Report on the Situation of Human Rights of a Segment of the Nicaraguan Population of Miskito Origin' OAS Doc OEA/Ser.L/V.II.62, (29 November 1983) pt 2(B) [15]. pt 2(B) [15].

¹⁰² See further, section 5.2.2 below.

¹⁰³ For a discussion see Jo M Pasqualucci, 'International Indigenous Land Rights: A Critique of the Jurisprudence of the Inter-American Court of Human Rights in Light of the United Nations Declaration on the Rights of Indigenous Peoples' (2009) 27 Wisconsin International Law Journal 51, 97.

¹⁰⁴ *Sawhoyamaya Indigenous Community v Paraguay* Inter-American Court of Human Rights Series C No 146, Case 0322/2001 (29 March 2006) ('*Sawhoyamaya*').

¹⁰⁵ *ibid* at 109–111.

¹⁰⁶ *ibid* at 112.

¹⁰⁷ *ibid* at 166. See also *Yakye Axa Indigenous Community v Paraguay*, Inter-American Court of Human Rights Series C No 125 (17 June 2005) ('*Yakye Axa*'). See also, Pereira and Gough (n 5) 489–491.

¹⁰⁸ *Saramaka People v Suriname* Inter-American Court of Human Rights Series C No 172 (28 November 2007). See also *ibid*.

¹⁰⁹ *ibid* at 159–174. See also Dinah Shelton, 'Self-Determination in Regional Human Rights Law: From Kosovo to Cameroon' (2011) 105 American Journal of International Law 60, 75; and *ibid*.

¹¹⁰ *Kichwa Indigenous People of Sarayaku v Ecuador* Inter-American Court of Human Rights Series C No 245 (27 June 2012).

article 21 of the Convention by awarding a private company an oil exploration and exploitation concession that partially covered the ancestral lands of the Kichwa people of Sarayaku, without a consultation process or their free, prior and informed consent.¹¹¹

The right to internal self-determination is applicable to the context of policies for fertility control of indigenous peoples. Given the specific vulnerability of indigenous peoples in most societies and what makes them distinct as a people, the right to internal self-determination (the most prominent forms being the right to self-government and autonomy) must also include the indigenous right to reject government policies that coercively subjects them to birth control programmes. From this perspective, autonomous governance is not only instrumental but also necessary for indigenous peoples to control the development of their distinctive culture. This includes the use of land, natural resources and reproductive health, against undue interference from disingenuous powerful economic interests or governments, as recognised in the 1994 Programme for Action¹¹² and the Framework of Actions adopted by the 2014 ICDP.¹¹³

4.2. THE RIGHT TO HEALTH AS A HUMAN RIGHT

Human rights are an increasingly important tool for the advancement of social justice. They provide the guiding principles to government agencies promoting social justice and provide individuals and groups with a powerful tool to ensure that government agencies commit themselves to human rights principles.¹¹⁴ The right to health is also recognised in some countries as a constitutional right.¹¹⁵

The right to reproductive health is a sub-category of the human right to health. The right to health was first articulated at the international level under the Constitution of the World Health Organisation (WHO) 1946, and subsequently established in several binding international human rights treaties.¹¹⁶ The right to health contains a number of elements that can be legally enforceable under national law, for example the right to non-

¹¹¹ *ibid* at 232. See also Pereira and Gough (n 5) 492.

¹¹² 1994 Plan for Action Programme (n 24), 6.21.

¹¹³ Framework of Actions for the follow-up to the Programme of Action of the International Conference on Population and Development Beyond (n 12) 59-61.

¹¹⁴ Cook et al (n 52) 148.

¹¹⁵ See eg the 1988 Constitutions of Brazil, art 6 and 196; and the 1996 South African constitution, chapter 2, 2.19, which recognises the right to 'health care'. See also, Pereira, R. 'Environmental Criminal Liability and Enforcement in European and International Law' BRILL, 2015.

¹¹⁶ For example, art 12 of the International Covenant on Economic, Social and Cultural Rights (n. 7); art 25.1 of the Universal Declaration on Human Rights GA Res 217A (III), UN Doc A/810 at 71 (1948); art 5 (e) (iv) of the International Convention on the Elimination of All Forms of Racial Discrimination (adopted 18 December 1979, entry into force 3 September 1981) GA Res 34/180 1249 UNTS 13; arts 11.1 (f) and 12 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) (adopted 18 December 1979, entry into force 3 September 1981) GA Res 34/180 1249 UNTS 13; and art 24 of the Convention on the Rights of the Child (20 November 1989, entry into force 2 September 1990) GA Res 44/25, annex 1577 UNTS 3. The right to health is also recognised in a number of regional human rights instruments, for example in art 11 of the European Social Charter (adopted 3 May 1996, entry into force 1 July 1999) ETS 163 (as revised); art 16 of the African Charter on Human and Peoples' Rights (adopted 27 June 1981, entry into force 21 October 1986) OAU Doc. CAB/LEG/67/3 rev. 5; 1520 UNTS 217 and art 10 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (adopted 17 November 1988, entry into force 16 November 1999). See also Paul Hunt, 'The Right to the Highest Attainable Standard of Health' (2007) 370 *The Lancet* 369.

discrimination in relation to health facilities, goods and services.¹¹⁷ Yet at the international level the right to health goes far beyond discrimination within health care provision.¹¹⁸ A rights-based approach to health indicators has been proposed in order to enable progressive realisation of the right to health to be monitored and measured.¹¹⁹ It has been argued that a human rights approach to health could have several advantages for health care practitioners, for example as the basis for equitable policies and programmes that benefit the most disadvantaged, raising more funds and improving terms and conditions of those who work in the health sector.¹²⁰

The UN Special Rapporteur on the right to health pointed out in UNGA Resolution A/59/422¹²¹ that there were profound disparities between the health of indigenous peoples and that of the non-indigenous population in many countries, the corollary of which is that 'indigenous people tend to die younger and generally live in poorer health than other population groups'.¹²² It was further suggested that:

(...) In some jurisdictions, they are more likely to have chronic disorders such as diabetes, high blood pressure or arthritis, and are more prone to substance abuse, depression and other mental disorders than are non-indigenous people. Suicide rates among indigenous women in certain developed countries are as high as eight times the national average. HIV/AIDS and other sexually transmitted diseases are spreading rapidly in indigenous communities, a trend fuelled by factors including social and economic exploitation of indigenous women, as well as a lack of access to health related information.¹²³

Further evidence of health inequalities includes: discrimination by some health professionals (who lack training and awareness of the particular needs of indigenous people); the lack of health services available in indigenous languages; the lack of clean drinking water and adequate sanitation; the impact of environmental contamination on the health of indigenous communities; and violence, including sexual violence, against indigenous women and children.¹²⁴ The Rapporteur's 2004 report to the UNGA also noted the systematic inequality in access to medical services and in the quality of these services; the marginalisation of traditional medicine of indigenous peoples; high rates of diseases such as diabetes; and high suicide rates, particularly among young indigenous

¹¹⁷ UN Economic and Social Council, General Comment no 14 'The Right to the Highest Attainable Standard of Health' (2000) <[http://www.unhcr.ch/tbs/doc.nsf/\(symbol\)/E.C.12.2000.4.En](http://www.unhcr.ch/tbs/doc.nsf/(symbol)/E.C.12.2000.4.En)> accessed 10 February 2015.

¹¹⁸ Hunt (n 116) 370. See para 4 of General Comment no 14.

¹¹⁹ See Report of the Special Rapporteur to the UN Economic and Social Council on the 'Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health', E/CN.4/2003/58 (13 February 2003).

¹²⁰ *ibid* at 370.

¹²¹ UN General Assembly 'The right of everyone to the enjoyment of the highest attainable standard of physical and mental health' A/59/422 8 October 2004.

¹²² *ibid*.

¹²³ *ibid*.

¹²⁴ *ibid*.

men. Maternal and child mortality rates can be twice as high as the national average in indigenous communities.¹²⁵

Concerns over the state of indigenous peoples' health were reiterated in the third session of the Permanent Forum on Indigenous Issues,¹²⁶ which also highlighted the need to address the right to health of indigenous women, including sexual and reproductive rights. Furthermore, the World Health Organisation (WHO) has published a number of reports specifically addressing health issues facing indigenous peoples,¹²⁷ urging States to 'protect the right of Indigenous people to the enjoyment of the highest standard of health.'¹²⁸ The WHO Commission has stated that 'every government should be assessed for its impacts on health and health equity; to make health and health equity a marker for government and economic performance.'¹²⁹ Importantly, the WHO has emphasised the importance of data disaggregation in order for policy-makers to effectively monitor the health of indigenous peoples.¹³⁰

It is also significant that the ILO no. 169 Convention¹³¹ – the only international treaty specifically aimed to protect indigenous peoples' rights - recognises the right to health for indigenous peoples and that they 'may enjoy the highest attainable standard of physical and mental health.'¹³² Yet it should be noted that, with 22 ratifications at present, the ILO n.169 Convention is not a widely ratified international treaty.¹³³

The adoption of the 2007 UN Declaration on the Rights of Indigenous Peoples, in particular the health-related Articles 22, 24 and 31 thereof, could further add support to indigenous peoples' claim for self-determination over their health, well-being and development. Even though, as discussed above, the Declaration is not legally binding, it could reflect States' *opinio juris* and practice, and thus provide the basis for its status as customary international law.¹³⁴ Moreover, the Declaration could have persuasive effect domestically and influence State and judicial practices.¹³⁵

¹²⁵ World Health Organisation, Health of the Indigenous Population in the Americas, Pan American Health Organisation (PAHO) (18 August 2006) <<http://www2.paho.org/hq/dmdocuments/2009/CD47-13-e.pdf>> accessed 15 February 2015.

¹²⁶ Permanent Forum on Indigenous Issues, 3rd Session (E/2004/43-E/C.19/2004/23).

¹²⁷ See eg World Health Organisation, 'WHO Traditional Medicine Strategy' (2002) <<http://www.who.int/hhr/activities/indigenous/en/>> accessed 10 February 2015.

¹²⁸ World Health Assembly Resolution 54.16 International Decade of the World's Indigenous Peoples (22 May 2001).

¹²⁹ WHO Commission on Social Determinants of Health 2008, *Closing the Gap in a Generation: Health equity through action on the social determinants of health*.

¹³⁰ WHO: Health of Indigenous Peoples Report, Fact sheet No 326 (October 2007). It notes that 'Statistical data on the health status of indigenous peoples is scarce. This is especially notable for indigenous peoples in Africa, Asia and Eastern Europe.'

¹³¹ Convention (No 169) Concerning Indigenous and Tribal Peoples in Independent Countries (n 11) art 15.

¹³² *ibid* art 25.

¹³³ The ILO 169 Convention was adopted on 17 June 1989 and entered into force on 5 September 1991.. It is notable that many Latin American states with large indigenous populations have ratified the convention.

¹³⁴ See Claire Charters, 'Indigenous Peoples and International Law and Policy' (2007) 18 Public Law Review 1.

¹³⁵ See for example the decision of the New Zealand Court of Appeal in *Ngai Tahu Maori Trust Board v Director-General of Conservation* [1995] 3 NZLR 553. See also *ibid*.

Given that most estimates suggest that the MDGs 2015 global health targets are likely to be missed,¹³⁶ governments are now focusing on post-2015 health targets. This paper contends that the right to reproductive autonomy and health need to be further developed in the post-2015 agenda. Calls have been made for the indicators set to measure progress in the post-2015 framework to be broken down by ethnic and cultural groups.¹³⁷ Moreover, the protection of the natural environment and land belonging to indigenous peoples should be seen as an integral aspect of protecting their right to health, as indigenous peoples' well-being is traditionally linked to the conservation of the ecosystem and community well-being. The indigenous right to land and to natural resources are firmly recognised in both the ILO n.169 Convention and the UNDRIP,¹³⁸ and have been upheld in decisions of international treaty monitoring bodies and regional courts.¹³⁹

The need to improve indigenous peoples' access to health services is often constrained by financial, geographic and cultural barriers.¹⁴⁰ Access to 'culturally appropriate' health services is necessary for indigenous peoples to gain full health rights.^{141 142} In some countries including Australia, New Zealand, Canada and Colombia, a further step has been made towards appropriate services where indigenous-controlled services exist with indigenous medicine practiced alongside mainstream medicine.¹⁴³ On the other hand, the recognition of indigenous traditional customs, traditions and healing practices under national health care programmes could pose a number of challenges. This can be illustrated in the case of South Africa, which has recently taken steps to formalise the role of traditional healers.

In February 2012, the Government inaugurated the Council for Traditional Health Practitioners to regulate the quality of services delivered by diviners, healers, traditional

¹³⁶ See the *Millennium Development Goals Report*, United Nations (New York, 2013) <<http://www.undp.org/content/dam/undp/library/MDG/english/mdg-report-2013-english.pdf>> accessed 10 February 2015.

¹³⁷ Every Mother Counts (n 30).

¹³⁸ See Article 14(1) of ILO Convention 169; and UNDRIP, UN Doc A/RES/61/295, art 29(1).

¹³⁹ See eg UN Human Rights Committee, Views: Communication No 511/1992, UN Doc CCPR/C/52/D/511/1992 (8 November 1994) ('Ilmari Länsman v Finland'); Human Rights Committee, Views: Communication No 671/1995, UN Doc CCPR/C/58/D/671/1995 (30 October 1996) ('Jouni Länsman v Finland'). *Yakye Axa Indigenous Community v Paraguay* (2005) Inter-American Court of Human Rights Series C No 125 ('Yakye Axa') (n 107); *Xákmok Kásek Indigenous Community v Paraguay* [2010] Inter-Am Court HR (ser C) No 214, [110]–[111]; *Saramaka People v Suriname* (2007) Inter-American Court of Human Rights Series C No 17 (n 108).

¹⁴⁰ In this regard, there has been debate of whether we should speak of a general human right to health, or instead of a more specific human right to health care, which should delineate the right to access to health services. See further, Cook et al (n 52).

¹⁴¹ See '2014 ICPD: Framework of Actions' (n 12) para 246.

¹⁴² This may include a right to consciously object to certain medical procedures that offend religious beliefs. See Human Rights Committee, General Comment No. 22 of 1993; and ECtHR judgment *Kokkinadis v Greece*, 25 May 1993, Ser. A-260, para 31.) See also M Eriksson, 'Reproductive Rights - The Challenge of Reconciling Ethics and Law' in S Berking and M Zolkos (eds) *Between Life and Death: Governing Populations in the Era of Human Rights* (Peter Lang 2009).

¹⁴³ See further B Puertas and M Schlessler, 'Assessing community health among indigenous populations in Ecuador with a participatory approach: implications for health reform' (2001) 26 *Journal of Community Health* 133; and Carolyn Stephens, John Porter, Clive Netteon, Ruth Willis, 'Disappearing, displaced and undervalued: a call to action for indigenous health worldwide' 2006 *The Lancet* 367, 2025.

birth attendants and herbalists.¹⁴⁴ While one benefit of traditional healers is that they are often more likely to be contacted than doctors applying mainstream therapies (this is especially so in the Zulu and Xhosa communities), there are disadvantages. For example, 42 deaths and hundreds of injuries to Xhosa boys from botched circumcisions were reported in the first six months of 2012.¹⁴⁵ This has led to calls for stronger regulations applicable to traditional healers in South Africa. The regulation of traditional healing practices, on the other hand, could be in direct conflict with the need for universal access of health services that recognises the needs and priorities of indigenous peoples. It is thus paramount that those two often-conflicting interests are carefully balanced under national health care laws and policies.

4.3. THE RIGHT TO REPRODUCTIVE HEALTH

Family planning programmes are imperative public policy mechanisms for tackling reproductive and sexual health problems, given that they are preventive in nature. Even though not all sexual and reproductive ill-health represents a violation of the right to health or other human rights, it could constitute a violation of those rights when it arises, in whole or in part, from the failure of a State to respect, protect or fulfil a human rights obligation.¹⁴⁶

Under international law, the concept of ‘family planning’ has been recognised as a basic human right in relatively recent times. Specifically, the term was used in the 1965 UN Commission Resolution on the Status of Women, which states that ‘married couples should have access to all relevant educational information concerning family planning.’¹⁴⁷ Yet as Ericsson points out, the term was not applied in the context of human rights until the 1968 UN Conference on Human Rights. It was held then that ‘parents have a basic human right to determine freely and responsibly the number and spacing of their children.’¹⁴⁸

Although neither the ILO no. 169 Convention nor the UNDRIP contain legal provisions recognising a specific right to reproductive health to indigenous peoples, the right is recognised in other international human rights instruments. In this regard, the Commission on Human Rights confirmed in Resolution 2003/28 that ‘sexual and reproductive health are integral elements of the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.’¹⁴⁹ In a similar fashion, principle 8 of the 1994 ICPD Programme of Action states that ‘everyone has the right to the enjoyment of the highest attainable standard of health’, which includes the State’s obligation to provide access to health care services ‘related to reproductive health care,

¹⁴⁴ Paige Jennings, Inga Thiemann, Laura A Young, ‘Africa’ in B Walker (ed) *State of the World’s Minorities and Indigenous Peoples* (2013), Minorities Rights Group 1 Events of 2012 55, <<http://www.minorityrights.org/download.php?id=1293>> accessed 15 February 2015.

¹⁴⁵ *ibid.*

¹⁴⁶ Economic and Social Council E/CN.4/2004/49, Report of Special Rapporteur (16 February 2004) para 13.

¹⁴⁷ K M Eriksson, *Reproductive Freedom in the Context of International Human Rights and Humanitarian Law* (Martinus Nijhoff 2000) 183.

¹⁴⁸ Article 16 of Final Act Proclamation, International Conference on Human Rights, Teheran 22 April to 13 May 1968 (*ibid.*).

¹⁴⁹ Commission on Human Rights Res 2003/28, preamble and para 6.

which includes family planning and sexual health.’¹⁵⁰ The 1994 ICPD Programme of Action further affirmed the ‘basic right of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children and to have the information and means to do so, and the right to attain the highest standard of sexual and reproductive health.’¹⁵¹ In 1995 the Platform for Action of the Beijing World Conference on Women adopted similar provisions on reproductive health.¹⁵² The main difference between the two instruments is that the Beijing Declaration confirms the right of women to control their sexuality.¹⁵³

This obligation of States to protect women’s (including indigenous women’s) reproductive rights was generally restated in the 2014 Framework of Actions of the second Cairo conference. It declares that:

States should guarantee indigenous peoples’ right to health, including their sexual and reproductive health and rights, as well as their rights to both the highest standard of care and the respectful accommodation of their own traditional medicines and health practices, especially as regards reducing maternal and child mortality, considering their socio-territorial and cultural specificities as well as the structural factors that hinder the exercise of these rights.¹⁵⁴

Yet the report has criticised States’ implementation of this obligation, noting that a considerable number have not addressed the issue of providing ‘culturally appropriate’ sexual and reproductive health care, including HIV prevention services for indigenous peoples.¹⁵⁵ It is also a cause for concern that some States in the Americas and Asia, despite having emphasised the right to health as a priority for indigenous peoples, have simultaneously excluded ‘sexual and reproductive health’ when listing areas that they prioritise concerning indigenous peoples.¹⁵⁶

The most important reference to family planning as a human right is however in the Convention on Elimination of All Forms of Discrimination against Women (CEDAW). CEDAW proclaims that women and men have equal right to decide ‘freely and responsibly on the number and spacing of their children and to have means to enable them to exercise this right.’¹⁵⁷ The reference in CEDAW to family planning is particularly significant since, unlike the aforementioned UNGA resolutions and the ICDP Action Programmes, CEDAW is a legally binding international treaty. CEDAW is widely

¹⁵⁰ 1994 ICPD Programme of Action, principle 8.

¹⁵¹ *ibid.*

¹⁵² Compare paras 7.2 and 7.3 of the ICPD Programme of Action; and paras 94 and 95 of the Beijing Platform for Action (A/CONF. 177/20/Rev.)

¹⁵³ See Paul Hunt and Judith de Mesquita, ‘The Rights to Sexual and Reproductive Health’, Human Rights Centre, University of Essex, nd, <<http://repository.essex.ac.uk/9718/1/right-sexual-reproductive-health.pdf>> accessed 15 February 2015.

¹⁵⁴ 2014 ICPD: Framework of Actions (n 12) para 246.

¹⁵⁵ ‘Just over half of the reporting countries (56 per cent) had addressed the issue of providing culturally appropriate “sexual and reproductive health care, including HIV prevention services for indigenous peoples.’ *ibid* para 249.

¹⁵⁶ They prioritised the right to health ‘other than sexual and reproductive health.’ *ibid* 166.

¹⁵⁷ Art 16 (1) (e) Convention on Elimination of All Forms of Discrimination against Women. See Ericsson (n 48) 184.

ratified (currently with 187 States parties), including Australia and Peru, although notably the US is not a party.¹⁵⁸

The CEDAW Committee¹⁵⁹ has raised the prospects of ‘family planning’ being elevated to the status of an international human right. In 1993, the Committee’s Recommendation stated that women have ‘the right to the number and spacing of their children.’¹⁶⁰ In general, however, the Committee avoids the term ‘family planning’, which suggests that it may have become outmoded and the need for it to be replaced by the more comprehensive term ‘reproductive health.’¹⁶¹ In support of the right of reproductive autonomy for women, the Committee held in General Recommendation no. 19 that ‘[c]ompulsory sterilization ... adversely affects women’s physical and mental health, and infringes the right of women to decide on the number and spacing of their children.’¹⁶²

The Programme of Action of the ICPD conference defines under Chapter VII, par. 7.2 reproductive health as ‘as state of complete physical, mental and social well-being and not merely the absence of disease or infirmity, in all matters relating to the reproductive system and to its functions and processes’, further affirming that the definition implies that people must ‘have the capability to reproduce and the freedom to decide if, when and how often to do so.’¹⁶³ It calls on governments and other important institutions to recognise the distinct perspective of indigenous people in relation to population and development. All human rights violations and discrimination, especially all forms of coercion, must be eliminated.¹⁶⁴ Moreover, the Programme of Action of the 1994 ICPD¹⁶⁵ declares non-coercion to be fundamental to population and reproductive health programmes and that ‘coercion in any form is unacceptable.’¹⁶⁶ Yet the more recent 2014 ICPD Framework of Actions has noted the slow progress of some States in adopting implementing and enforcement measures to ensure full enjoyment of reproductive health rights.¹⁶⁷

The right to reproductive health, which includes the right to family planning, thus includes both a positive and negative State obligation. The positive obligation involves the requirement for States to provide all the essential health care facilities and services, while the negative obligation revolves around the State’s need to abstain from interfering

¹⁵⁸ The Committee on the Elimination of All Forms of Discrimination Against Women has been transferred on 1 January 2008 to the Office of the High Commissioner on Human Rights in Geneva. See Eriksson (n 147) 183.

¹⁵⁹ On the powers of the CEDAW Committee, see further, section 5.2.1. below.

¹⁶⁰ Recommendation No 21. See also, Ericsson (n 48) who argues that the Resolution is ‘the only authoritative interpretation of the right to family planning.’ 184.

¹⁶¹ *ibid* at 185. In its Fifty-second Session on 25 February – 7 March 2008 the CSW has adopted resolutions on ‘Ending Female Genital Mutilation’ E/CN.6/2008/L.2/Rev.1 and on ‘Women, the Girl Child and HIV/AIDS’ E/CN.6/2008/L.5/REV.1

¹⁶² CEDAW Committee, General Recommendation No 19. See further section 5.2.1., which discusses communications brought before the Committee.

¹⁶³ See 2014 ICPD Framework of Action (n 12).

¹⁶⁴ Programme of Action of the 1994 ICPD, para 6.25 (n 24).

¹⁶⁵ A/CONE 171/13.

¹⁶⁶ Babor (n 47) 118.

¹⁶⁷ ‘In the area of sexual and reproductive health and reproductive rights, less than two thirds of countries (63 per cent) have promulgated and enforced a law protecting the right to the highest attainable standard of physical and mental health, including sexual and reproductive health. See 2014 ICPD Framework of Action (n 12).

with one's individual reproductive choices through coercive population control programmes.

The 1994 and 2014 ICPD Programmes of Action and Beijing Declaration and Platform for Action are, alongside the CEDAW, the most influential and authoritative international documents on the right to reproductive and sexual health.¹⁶⁸ Furthermore, even though the subsequent MDGs do not expressly refer to sexual and reproductive health, at least three of the eight Goals – on maternal health, child health and HIV/AIDS – are relevant to sexual and reproductive health.¹⁶⁹ Other international initiatives recognising reproductive health rights for indigenous peoples include the outcome document of the 2014 World Conference on Indigenous Peoples,¹⁷⁰ and the conclusions of the World Conference on Indigenous Women in Lima, Peru, in 2013.¹⁷¹ The 59th session of the Commission on the Status of Women that took place in New York from 9 to 20 March 2015 focused on the current challenges that affect the implementation of the 1995 Beijing Declaration and Platform for Action.¹⁷²

In addition, a number of regional treaties have been adopted affirming, expressly or indirectly, women's reproductive health rights. Particularly important is the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women (Convention do Belem do Para),¹⁷³ which affirms that 'violence against women constitutes a violation of their human rights and fundamental freedoms' and establishes the state duty to protect woman against violence.¹⁷⁴ Although women's reproductive rights (for example, against forceful sterilisation programmes) are not listed in Article 4 of the Convention, that provision is not supposed to be exhaustive. As such, the Convention can be interpreted to also protect women's reproductive rights in its

¹⁶⁸ UN General Assembly Report of the Ad Hoc Committee of the Whole of the Twenty-First Special Session of the General Assembly, *Overall Review and Appraisal of the Implementation of the Programme of Action of the International Conference on Population and Development*, A/S-21/5/Add.1 (New York: UN 2000); and *Further Actions and Initiatives to Implement the Beijing Declaration and Platform for Action*, A/S-23/10/Rev. 1) (New York: UN 2000).

¹⁶⁹ See Report of the Special Rapporteur to the UN Economic and Social Council on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health (n 119).

¹⁷⁰ Sixty-ninth session, Item 66 of the provisional agenda, Rights of indigenous peoples Draft resolution submitted by the President of the General Assembly Outcome document of the high-level plenary meeting of the General Assembly known as the World Conference on Indigenous Peoples,...

¹⁷¹ The conference was attended by indigenous women from over fifty countries with the aim to reach agreement on a number of issues ahead of the International Conference on Population and Development (ICPD) 2014 ('Cairo+20'), the 59th session of the Commission on Status of Women (CSW59/ Beijing+20), the 2014 World Conference on Indigenous Peoples and the post-2015 Development Agenda. See the UN General Assembly, sixty-ninth session, Draft outcome document of the United Nations summit for the adoption of the post-2015 development agenda, A/69/L.85 12 August 2015. The conference has recognized that a number of practices which violate indigenous women reproductive autonomy. See further, IWGIA, 'The Indigenous World – 2014' <http://www.iwgia.org/iwgia_files_publications_files/0671_I2014eb.pdf> accessed 10 February 2015.

¹⁷² CSW59/Beijing+20 (2015). See further 'CSW59/Beijing+20 (2015)' <<http://www.unwomen.org/en/csw/csw59-2015#sthash.DjzvW4kk.dpuf>> accessed 10 February 2015.

¹⁷³ There are 32 parties to the Convention, yet it is notable that the United States and Canada have not ratified it. The text of the Convention is available at <<http://www.oas.org/juridico/english/treaties/a-61.html>> accessed 15 February 2015.

¹⁷⁴ See Organization of American States (OAS), Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women ('Convention of Belem do Para'), 9 June 1994, art 7.

provisions concerning the protection of women against violence.¹⁷⁵ Within the Council of Europe framework, the Convention on Human Rights and Biomedicine ('Oviedo Convention') requires that an intervention in the health field cannot be carried out without the free and informed consent of the person concerned. This must be done on the basis of objective information, provided without any pressure, regarding the nature and consequences of the medical intervention and its alternatives.¹⁷⁶ Perhaps the most significant regional treaty concerning the right to reproductive health is the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (the 'Maputo Protocol').¹⁷⁷ This Protocol entered into force on 25 November 2005 and has so far been ratified by 36 African Union States.¹⁷⁸ The Protocol recognises 'health and reproductive rights' for women in Africa including 'the right to control fertility' and 'the number of children and spacing of children.'¹⁷⁹

It seems clear from the foregoing that there is a relatively well-developed body of international norms and instruments recognising the right to reproductive health as a human right, although the majority of these instruments are non-binding. CEDAW is one of the few exceptions as an international treaty recognising the right to reproductive health and autonomy of women. However, one of its key weaknesses is that, from the broader perspective of population policies, CEDAW has a more limited scope as it aims to affirm women's rights, and hence forced male sterilisation and forced child removals are not expressly outlawed under CEDAW.

To conclude, the rights to self-determination, to health and to reproductive health provide the essential substantive basis for the affirmation of indigenous peoples' reproductive autonomy. The next section assesses the extent to which there are mechanisms under international law for these rights to be adjudicated and protected.

5. PROCEDURAL RIGHTS FOR ASSERTION OF INDIGENOUS PEOPLES' RIGHT TO REPRODUCTIVE AUTONOMY

The substantive norms discussed in the previous sections could be easily disregarded by States if there were no effective legal and extra-judicial mechanisms for enforcement and settlement of disputes. This section examines the procedural rights (such as the right to prior and informed consent, to participate in decision-making and to access to judicial and extra-judicial remedies) that exist internationally, regionally and nationally for the assertion of indigenous peoples' reproductive rights and for reprehension of government population policies that infringe those rights.

¹⁷⁵ See Art 4 *ibid*.

¹⁷⁶ Art 5 of the Convention for the Protection of Human Rights and Dignity of the Human Being with Regard to the Application of Biology and Medicine ('Convention on Human Rights and Biomedicine') (adopted on 4 April 1997, in force 1 December 1999) CETS No 164.

¹⁷⁷ Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa. Adopted by the 2nd Ordinary Session of the Assembly of the Union, Maputo (11 July 2003).

¹⁷⁸ See 'List Of Countries Which Have Signed, Ratified/Acceded To The Protocol to the African Charter on Human And Peoples' Rights on the Rights of Women in Africa' <<http://www.au.int/en/sites/default/files/Rights%20of%20Women.pdf>> accessed 10 February 2015.

¹⁷⁹ See Article 14 of the Protocol, *supra*.

5.1. THE RIGHT TO PRIOR AND INFORMED CONSENT AND TO PARTICIPATION IN DECISION-MAKING UNDER INTERNATIONAL LAW

International law recognises the principle that indigenous peoples should be consulted in decisions made by national authorities and others that could affect them.¹⁸⁰ The right to consultation and to prior and informed consent should serve as a basis for indigenous peoples to reject policies that subject them to birth control programmes. Indeed, the right to free, prior and informed consent is at heart of cases regarding reparations for victims of involuntary sterilisation programmes.¹⁸¹

The right to consultation is enshrined in ILO Convention 169¹⁸² which employs different standards ranging from consultation to participation and informed consent.¹⁸³ According to the Convention, consultation must be undertaken ‘in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent.’¹⁸⁴ Indigenous peoples’ participation in the broadest level of governance (including in national parliamentary debates) must not supplant local participation in connection with specific issues or projects that impact on their well-being.¹⁸⁵ This right is further recognised in the UNDRIP, which defines the right of indigenous peoples to participate in decision-making in matters that could impact on their rights — through representatives chosen by them in accordance with their own procedures — as well as the right to maintain and develop their own indigenous decision-making institutions.¹⁸⁶ Before adopting and implementing legislative or administrative measures that may affect them,¹⁸⁷ States must consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent. In particular, the free, prior and informed consent of indigenous peoples needs to be defined in accordance with their customary laws and practices.¹⁸⁸ Both the ILO Convention 169 and the UNDRIP thus recognise that consultation is an obligation when indigenous peoples’ fundamental rights are concerned.¹⁸⁹ Those developments have led Anaya to argue that ‘widespread acceptance of the norm of

¹⁸⁰ See generally, James Anaya, ‘Indigenous Peoples’ Participatory Rights in relation to Decisions about Natural Resource Extraction: The More Fundamental Issue of What Rights Indigenous Peoples Have in Lands and Resources’ (2005) 22 Arizona Journal of International and Comparative Law 7, 7.

¹⁸¹ See for example, UN Committee on the Elimination of Discrimination Against Women, *A.S. v Hungary*, Communication No. 4/2004, CEDAW/C/36/D/4/2004, 29 August 2006; *VC v Slovakia*, ECtHR App no 18968/07, 8 November 2011; and *NB v Slovakia*, ECtHR App no 29518/10, 12 June 2012.

¹⁸² Convention (No 169) concerning Indigenous and Tribal Peoples in Independent Countries (n 11) art 15. See also, Pereira and Gough (n 5) 476.

¹⁸³ This is also recognised in art 19 of the UNDRIP.

¹⁸⁴ ILO Convention 169 (n 11) art 6(2).

¹⁸⁵ Bartolomé Clavero, ‘The Indigenous Rights of Participation and International Development Policies’ (2005) 22 Arizona Journal of International and Comparative Law 41. See also, Pereira and Gough (n 5) 476.

¹⁸⁶ UNDRIP, UN Doc A/RES/61/295 (n 92) art 18.

¹⁸⁷ *ibid* art 19.

¹⁸⁸ Bartolomé Clavero, ‘The Indigenous Rights of Participation and International Development Policies’ (2005) 22 Arizona Journal of International and Comparative Law 41, 42. See also Margaret Satterthwaite and Deena Hurwitz, ‘The Right of Indigenous Peoples to Meaningful Consent in Extractive Industry Projects’ (2005) 22 Arizona Journal of International and Comparative Law 1.

¹⁸⁹ James Anaya, ‘Indigenous Peoples’ Participatory Rights’ (n 180) 10–12.

consultation demonstrates that it has become part of customary international law.¹⁹⁰

The extent of this duty to consult has been intensely debated. In particular, it is contended that the right of indigenous peoples to participate in decision-making should include the right to veto decisions affecting them (i.e. to give their consent).¹⁹¹ Aside from the circumstances that would involve relocation,¹⁹² the ILO Convention 169 generally falls short of requiring the consent of indigenous peoples, and instead establishes the principle of consultation and that they have the right to participate in decision-making.¹⁹³ The Convention also incorporates indigenous peoples' right to participate in decision-making in matters that would affect their rights¹⁹⁴ before the adoption and implementation of such legislative or administrative measures.¹⁹⁵ The international jurisprudence and State practices advancing the right to prior and informed consent for indigenous peoples has been developed particularly in the context of relocation and the right to participate in the context of extractive industry projects.

This right must also be recognised in the context of other coercive policies impacting on indigenous peoples well-being, including sterilisation and birth control programmes. Indigenous peoples' participatory rights regarding state health and population policies are expressly recognised in the 1994 Programme of Action to the ICPD, which called for governments to 'incorporate the perspectives and needs of indigenous communities into the design, implementation, monitoring and evaluation of the population, development and environment programmes that affect them.'¹⁹⁶

Beyond those international initiatives, there are specific regional instruments recognising the principle that a medical intervention in to one's health cannot be carried out without the free and informed consent of the person concerned.¹⁹⁷ There remain many barriers to implementation of the right to prior and informed consent in national legislation, which include inadequacy of laws and regulations, lack of articulated community procedures and the lack of will to facilitate access by some local communities.¹⁹⁸ The requirement that consent be 'free' suggests that it should be obtained without coercion, intimidation or manipulation. Secondly, 'prior' suggests that the consent is sought sufficiently in advance of any authorisation or commencement of activities and respect time requirements of indigenous consultation/consensus processes.

¹⁹⁰ *ibid* 7.

¹⁹¹ *ibid*.

¹⁹² See ILO Convention 169 art 16(2); See also UNDRIP, UN Doc A/RES/61/295 (n 11) art 10. See further, Pereira and Gough (n 5) 477-478.

¹⁹³ See, eg ILO Convention 169 (n 11) art 15(2) and art 7(1).

¹⁹⁴ *ibid* art 18.

¹⁹⁵ *ibid* art 19.

¹⁹⁶ UN Population Fund, Programme of Action of the ICPD (n 24) 6.24. (a)

¹⁹⁷ See Convention for the Protection of Human Rights and Dignity of the Human Being with Regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine (adopted 4 April 1997; in force 1 December 1999) CETS No 164, art 5.

¹⁹⁸ Anne Perrault, 'Facilitating Prior Informed Consent in the Context of Genetic Resources and Traditional Knowledge' (2004) 4(2) Sustainable Development Law and Policy 21, 23. See also Pereira and Gough (n 5) 479.

Finally, ‘informed’ requires that there be sufficient information regarding the nature, size, pace and scope of any proposed project or activity.¹⁹⁹

The need to obtain a patient’s prior and informed consent has been paramount to the development of international jurisprudence concerning forced sterilisations. For example, in *V.C. v. Slovakia* the European Court of Human Rights (ECtHR) held that ‘where sterilisation was carried out without the informed consent of a mentally competent adult, it was incompatible with the requirement of respect for human freedom and dignity.’ Therefore, it was in breach of Article 3 ECHR on the prohibition on torture and inhuman or degrading treatment; and Article 8 ECHR on the right to private and family life.²⁰⁰ Moreover, as discussed above, the lack of free, prior and informed consent were paramount to the findings by the Peruvian Human Rights Ombudsman Office that the Peruvian sterilisation programme violated indigenous women’s reproductive rights.²⁰¹

The procedures for obtaining indigenous peoples’ consent should be ‘culturally appropriate,’ in line with the international initiatives concerning the right to health.²⁰² In this regard, language is often a barrier in the context of access to sexual and reproductive health services.²⁰³ For example, it has been suggested that in some languages there is no term for fistula (there are only derogatory words for the condition), making open discussion difficult and perpetuating stigma and discrimination and restricting access to services.²⁰⁴ It is thus recommended that mutual forms of communication be implemented between service providers and users, taking into account local languages and customs.

5.2. THE RIGHT TO ACCESS TO JUSTICE: THE JUDICIAL AND EXTRA-JUDICIAL AVENUES FOR ASSERTION OF INDIGENOUS PEOPLES’ REPRODUCTIVE HEALTH RIGHTS

The right of individuals and communities to bring effective mechanisms for justice and redress is a fundamental aspect of the evolution of international human rights law. International courts generally fail to establish a right of standing to individuals, groups of individuals or corporations to bring legal proceedings for defence of individual or collective rights. In particular, the International Court of Justice only has jurisdiction over disputes between states.²⁰⁵ Despite this, this section discusses a number of other

¹⁹⁹ See Margaret Satterthwaite and Deena Hurwitz, ‘The Right of Indigenous Peoples to Meaningful Consent in Extractive Industry Projects’ (2005) 22 *Arizona Journal of International and Comparative Law* 1, 55–6. See also *ibid.*

²⁰⁰ *VC v Slovakia*, ECtHR App no 18968/07 (8 November 2011). See also Lindsay Hoyle, ‘V.C. v. Slovakia: A Reproductive Rights Victory Misses the Mark’, (2014) Boston College Law School, 2.

²⁰¹ Defensoria del Pueblo, Informe Defensorial No 69. Lima: Defensoria del Pueblo (November 2002). See also, Miranda and Yamin (n 55).

²⁰² For example, in a dispute involving an oil exploration concession in Ecuador and Colombia, the ILO Compliance Committee employed art 6(2) of ILO Convention 169 to make clear that consultations must be in good faith, through culturally appropriate procedures and with the objective of reaching an agreement with the affected indigenous peoples. See Governing Body ILO, *Report of the Committee Set Up to Examine the Representation Alleging Non-Observance by Ecuador of the Indigenous and Tribal People’s Convention, 1989 (No 169), Made under Article 24 of the ILO Constitution by the Confederación Ecuatoriana de Organizaciones Sindicales Libres (CEOSL)*, 282nd sess, ILO Doc GB.282/14/2 (November 2001) 38.

²⁰³ Joanna Crichton, Celestine Nyamu-Musembi, Johannes John-Langba and Sally Theobald ‘Sexual and Reproductive Health Rights in Africa’ (2006) 367 (24) *The Lancet* 2044.

²⁰⁴ *ibid.*

²⁰⁵ See Article 36, ICJ Statute. The ICJ has dealt with only a few cases involving indigenous peoples rights,

international, regional and national forums for indigenous peoples to bring claims for violations of their reproductive health rights. This section examines in particular their rights to access to justice before international human rights treaties monitoring bodies; the ILO Convention 169 Compliance Committee; two regional human rights systems; international and national criminal courts; as well as alternative mechanisms to litigation, such as truth and conciliation commissions.

5.2.1. UN Human Rights Treaties' Supervisory Bodies

The supervisory or monitoring bodies established under specific human rights treaties offer a level of protection against violations of indigenous peoples' reproductive rights. One example is the CEDAW Committee, which may be called upon in cases involving violations of reproductive health and indigenous women's rights. In addition to recommendations to State reports, Optional Protocol (1999) to CEDAW,²⁰⁶ introduces a system whereby communications detailing violations of the Convention may be submitted to the Committee. Both Australia (since December 2008) and Peru (since April 2001) are parties to this Optional Protocol. The CEDAW Committee has focused on problems faced by indigenous women in its observations to State reports, which have included recommendations regarding sexual violence against indigenous women.²⁰⁷ The disrespect for indigenous women's human rights and violence against them are part of a general pattern of gender injustice and neglect by governments, while the international indigenous rights movement itself often turns a blind eye to the issue.²⁰⁸

On August 2006 the CEDAW Committee found for the first time that restrictions on women's reproductive freedom constituted a human right violation, and decided that Hungary had violated the Convention by not ensuring that a Roma woman (A. S.) who was sterilised in January 2001 had given her fully informed consent.²⁰⁹ The Committee considered that she has a right protected by article 10(h) CEDAW to specific information on sterilisation and alternative procedures for family planning in order to guard against such an intervention being carried out without her having made a fully informed choice.²¹⁰ The Committee found that a failure by the State - through the hospital personnel - to provide appropriate information and advice on family planning constituted

see eg Western Sahara [1975] ICJ Rep 12; Land, Island and Maritime Frontier Dispute (El Salvador v Honduras) (Judgment on Application by Nicaragua for Permission to Intervene) (1990) ICJ Rep 92, 133, 95-96 ('El Salvador v Honduras').

²⁰⁶ Adopted by General Assembly Res A/54/4 (6 October 1999).

²⁰⁷ See eg UN Committee on the Elimination of Discrimination Against Women, 'Concluding Observations: Brazil' UN Doc A/58/38 (7 July 2003) para 62.

²⁰⁸ See Rauna Kuokkanen, 'Self-Determination and Indigenous Woman's Rights at the Intersection of International Human Rights' (2012) 34 (1) Hum. Rts Q 225.

²⁰⁹ UN Committee on the Elimination of Discrimination Against Women, *A.S. v. Hungary*, Communication No. 4/2004, CEDAW/C/36/D/4/2004, 29 August 2006. Similar complaints about forced sterilisations were made against the minority Roma population in Hungary in 2010. See Immigration and Refugee Board of Canada, Reports of the forced sterilization of women (2000-2011) HUN103861.E, 4 November 2011, <<http://www.unhcr.org/refworld/country,...HUN,,4f9695202,0.html>> accessed 10 February 2015.

²¹⁰ *ibid* para 5.8.

a violation of the complainant's right under article 10(h) CEDAW.²¹¹ The Committee further recommended that Hungary introduce legislation on informed consent.²¹²

As Peru only ratified the Optional Protocol in 2001 (when the Government's sterilisation programme had already been brought to an end), communications could not be submitted to the Committee.²¹³ However, in its observations on Peru's report the Committee explicitly condemned the sterilisation practices in August 2002, expressing its concern over the 'numerous cases of sterilisation of women without prior informed consent, using psychological violence or the promise of financial incentives, thus affecting women's right to decide the number and spacing of their children' and its regret that 'those responsible have not been punished.'²¹⁴ In a more recent case that demonstrates CEDAW's scope in dealing with reproductive health rights of minorities or ethnically discriminated groups, the Committee held that the lack of access to quality medical care during pregnancy was a systematic problem in Brazil. It found that an Afro-Brazilian woman who died due to the lack of adequate emergency obstetric care had been discriminated against because of her ethnic status.²¹⁵ In February 2014 the Brazilian Government reached a settlement with the victim's family in the case, agreeing to pay compensation.²¹⁶

Another example is the work of the Human Rights Committee against Torture. In its 2006 Report on Peru expressed concerns at reports of women undergoing forced sterilisation and considered that the State failed to take steps to prevent acts that put women's physical and mental health at grave risk and that constitute cruel and inhuman treatment.²¹⁷

While not dealing explicitly with indigenous peoples' reproductive rights, the Human Rights Committee (HRC) has continued to favour an interpretation of Article 27 ICCPR that includes strong indigenous land, cultural and language rights.²¹⁸ The HRC has heard a number of cases regarding reproductive health, although not specifically

²¹¹ The Committee also applied Article 12 (1) of the Convention.

²¹² Similar grounds emphasizing the freedom of choice of contraceptive methods were used by the Committee to condemn the criminalization of abortion by certain states. See eg *Case of L.C. v. Peru*, CEDAW, Communication No 22/2009, para 8.15, UN Doc CEDAW/c/50/D/22/2009 (2011) (para 228)..

²¹³ See also, *L.C. v. Peru*, *Communication No. 22/2009*, Committee on the Elimination of Discrimination Against Women, CEDAW/C/50/D/22/2009 (decision of 17 October 2011).

²¹⁴ Annual Report, A/57/38 (part 3, paras 463-502) CEDAW/C/SR.583 and 584. See also Human Rights Committee, 'Concluding observations: Peru' 15/11/2000.CCPR/CO/70/PER.

²¹⁵ CEDAW recommended that Brazil ensure affordable access for all women to adequate emergency obstetric care. *Alyne da Silva Pimentel v. Brazil* (10 August 2011) CEDAW/C/49/D/17/2008.

²¹⁶ See Centre for Reproductive Rights, 'Brazilian Government Gives Monetary Reparations As Part of Historic United Nations Maternal Death Case' <<http://reproductiverights.org/en/press-room/brazilian-government-gives-monetary-reparations-as-part-of-historic-united-nations-matern>> accessed 10 February 2015. See further, Brazilian Health Ministry, 'Brazil Health 2006: An Analysis Of Inequality In Health' (Ministério Da Saúde, Saúde Brasil 2006 – Uma Análise Da Desigualdade Em Saúde) 366 (2006) 367; Ministério Da Saúde, Política Nacional De Atenção Integral A Saúde Da Mulher: Princípios E Diretrizes 26 (2004); Brazil: Maternal And Child Health, para 2.8, 20-21; UN Reading Of Brazil's Challenges And Potential 41, 14.

²¹⁷ Committee against Torture, Thirty-sixth session (1-19 May 2006) 'Consideration of Reports submitted by State Parties under Article 19 of the Convention, Conclusions and recommendations of the Committee against Torture, Committee Against Torture (CAT) – Peru' CAT/C/PER/CO/4, 25 July 2006.

²¹⁸ See for example, Human Rights Committee, *Sandra Lovelace v. Canada*, Communication No. R.6/24 (29 Dec 1977) UN GAOR 166, UN Doc A/36/40 (1981).

concerning the rights of indigenous women. For example, in *K. L. v. Peru* the HRC asserted that it is the ‘state responsibility to ensure access to legal abortion services.’²¹⁹ An important development concerning indigenous women’s reproductive rights was the HRC’s 2009 call on the Australian Government to ‘adopt a comprehensive national mechanism to ensure that adequate reparation, including compensation, is provided to the victims of the Stolen Generations policies.’²²⁰

The UN Committee on Economic, Social and Cultural Rights (ESCR Committee) has defined the minimum standards for delivering the right to health in goods, facilities and services, including the underlying determinants of health care, in particular their availability, accessibility, acceptability and quality.²²¹ The ESCR Committee also emphasised the participation of indigenous peoples in decisions relating to the right to health.²²² In a decision of 28 November 2014, the Committee called on the Romanian Government to revise its laws and policies to ensure access to reproductive health care for women and adolescents and recommended the implementation of a national strategy on sexual and reproductive health.²²³

Also significant has been the role played by the Committee on the Elimination of Racial Discrimination (CERD). CERD has intensified its monitoring of indigenous issues and encouraged many States to review their policies concerning indigenous peoples. In this vein, CERD has used the ‘Urgent Action Procedure’ in order to address the discriminatory policies of some States.²²⁴

5.2.2. ILO Convention Compliance Committee

State parties to the ILO Convention no. 169 are required to report on measures taken to ensure the implementation of ratified ILO conventions and any problems encountered to

²¹⁹ Human Rights Committee, Communication No 1153/2003, Eighty-fifth session, 17 October - 3 November 2005. See also Dru Bhattacharya, *Global Health Disputes and Disparities: A Critical Appraisal of International Law and Population Health* (Routledge 2012)

²²⁰ Consideration of Reports Submitted by States Parties under Article 40 of the Covenant Concluding Observations of the Human Rights Committee, Australia, Human Rights Committee, Ninety-fifth session Geneva, 2 April 2009 CCPR/C/AUS/Co/5.

²²¹ See UN Doc E/C.12/2005/4 (11 August 2005) para 29; Corinne Lennox, ‘Addressing health inequalities in the post-2015 development framework’ in B Walker (n 144).

²²² Referring to the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (UNDM), the Committee held that Minorities have the right ‘to participate effectively in decisions on the national and, where appropriate, regional level concerning the minority to which they belong or the regions in which they live’ (art 2.3). Moreover, ‘[n]ational policies and programmes shall be planned and implemented with due regard for the legitimate interests of persons belonging to minorities’ (art 5.1). See also, Committee on Economic, Social and Cultural Rights, ‘Concluding Observations: Colombia’ (30 November 2001) 27th sess UN Doc E/C.12/1/Add.74 ([33].

²²³ Committee on Economic, Social and Cultural Rights (CESCR) - International Covenant on Economic, Social and Cultural Rights 53rd Session (10 Nov 2014 - 28 Nov 2014). See further Center for Reproductive Rights, ‘U.N. Committee Denounces Romania for Denying Women Reproductive Health Care’ (12 August 2014) <<http://reproductiverights.org/en/press-room/un-committee-denounces-romania-for-denying-women-reproductive-health-care>> accessed 10 February 2015.

²²⁴ *ibid.* In the context of the sterilisation programme in Mexico, see Committee on the Elimination of Racial Discrimination, Reports Submitted by States Parties under Article 9 of the Convention, Comments by the Government of Mexico on the Concluding Observations of the Committee on the Elimination of Racial Discrimination, CERD/C/MEX/CO/15/Add.1 (29 June 2007).

the Committee of Experts on the Application of Conventions and Recommendations (CEACR) (the ILO Compliance Committee). This Committee may take specific action against non-compliance, including the power to submit ‘observations’ and make ‘direct requests’,²²⁵ yet the Committee’s powers to impose sanctions are more limited.²²⁶ The ILO Compliance Committee has contributed to indigenous peoples rights jurisprudence, including by recognising that consultations must be held when indigenous peoples interests are involved.²²⁷

Although the Committee has not decided a case involving Peru’s sterilisation programme,²²⁸ in *Guerrero and Oaxaca* it has received complaints and reports of investigations, observations and recommendations regarding alleged violations of indigenous peoples’ reproductive rights. It was alleged that members of public health institutions (both state and federal) have performed vasectomies on indigenous men and fitted indigenous women with intra-uterine devices as a method of birth control, without their free, informed consent, in two Mexican states.²²⁹ Moreover, a local study alleged that the health system for indigenous communities was precarious and referred to the inhumane and discriminatory treatment of indigenous persons in health-care centres and to the practice of forced sterilisation of women by tying their fallopian tubes.²³⁰ In response, the Mexican Government indicated that its health institutions have no record of judicial or administrative complaints concerning alleged violations of sexual and reproductive rights of the indigenous population and that their freedom of choice had been fully respected.

The Committee did not find this response entirely persuasive. As such, the Committee requested Mexico to supply information on the steps taken to guarantee that the decision to take permanent contraceptive measures is indeed a free choice and to ensure that the persons concerned are fully aware of the permanent nature of the sterilisation measures. Moreover, the Committee requested Mexico to supply information on the extent to which indigenous peoples participate and are consulted regarding

²²⁵ See, International Labour Organisation, ‘Supervision: the ILO’s Supervisory System’, <<http://www.ilo.org/indigenous/Conventions/Supervision/lang--en/index.htm>> accessed 15 February 2015.

²²⁶ See also, art 33 of the ILO Constitution.

²²⁷ See, for example, Report of the Committee Set Up to Examine the Representation Alleging Non-Observance by Colombia of the Indigenous and Tribal Peoples Convention, 1989 (No 169), Made Under Article 24 of the ILO Constitution by the Central Unitary Workers’ Union, ILO Doc GB.282/14/2 (21 November 2001). See further, James Anaya, ‘Indigenous Peoples’ Participatory Rights In Relation To Decisions About Natural Resource Extraction: The More Fundamental Issue Of What Rights Indigenous Peoples Have In Lands And Resources’ (2005) 22 (7) *Arizona Journal of International & Comparative Law* 2, 12.

²²⁸ Peru ratified the ILO 169 Convention on 2 February 1994. At the time of writing, Australia has not ratified the Convention. See International Labour Organisation, ‘Ratifications of C169 - Indigenous and Tribal Peoples Convention, 1989 (No. 169)’ <https://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312314> accessed 10 February 2015.

²²⁹ Forced sterilisation. Follow-up to the Governing Body report of March 2004 (GB.289/17/3). See ‘Monitoring Indigenous and Tribal Peoples’ Rights through ILO Conventions: A Compilation of ILO supervisory bodies’ comments’ <http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/publication/wcms_126028.pdf> accessed 10 February 2015.

²³⁰ Representation alleging non-observance by Mexico of the Indigenous and Tribal Peoples Convention, 1989 (No 169), made under article 24 of the ILO Constitution by nine workers’ organizations, Representation (article 24) - Mexico - C169 – 2004.

reproductive health and family planning.²³¹

In a the report delivered to the Committee in September 2013, the Mexican Government indicated that the procedure implemented by the Opportunities Programme of the Mexican Social Security Institute (IMSS) is of informed and shared consent.²³² The Government further noted that in 2012, the Gender Equity Action Programme with the Indigenous Population (PAIGPI) consolidated its initiatives in relation to the Indigenous Women's Forum and developed projects for indigenous women's organisations addressing violence and sexual and reproductive health.²³³

The Committee invited Mexico to continue providing information on the manner in which informed consent concerning sexual and reproductive rights has been included in programmes intended for indigenous communities.²³⁴ Despite the fact that, as yet, no overwhelming evidence was presented to the Committee showing that the Mexican sterilisation programme failed to respect women's right to free and informed consent, the *Guerrero and Oaxaca* case is particularly significant. The significance of this case relates to the fact that it shows the potential for international human rights law to condemn and ultimately revert an existing population policy programme that violates indigenous peoples' reproductive rights.

5.2.2. Regional Human Rights Systems

A State party may declare that it recognises as binding the jurisdiction of the Inter-American Court of Human Rights (IACtHR) on all matters relating to the interpretation or application of the ACHR.²³⁵ Twenty-one (out of the 34) member States of the Organization of American States have accepted the Court's jurisdiction.²³⁶

It is well-established in the IACtHR's jurisprudence that a State's omission to provide effective protection against threats to indigenous populations - including those to their health - can lead to the liability of the State itself. For example, in *Sawhoyamaya Indigenous Community v. Paraguay*,²³⁷ the Court ruled that Paraguayan legislation failed to provide an effective judicial remedy aimed at protecting legitimate land claims made by indigenous communities, which constituted a *per se* violation of the ACHR. Moreover, the Court has stated that the displacement and expropriation of indigenous'

²³¹ *ibid.*

²³² International Labour Organisation, Observation (CEACR) - adopted 2013, published 103rd ILC session (2014), 'Indigenous and Tribal Peoples Convention, 1989 (No. 169) – Mexico', Follow-up to the recommendations of the tripartite committee (representation made under article 24 of the Constitution of the ILO).

²³³ *ibid.*

²³⁴ *ibid.*

²³⁵ Inter-American Convention on Human Rights, art 62 (1).

²³⁶ See Inter-American Commission on Human Rights Organisation of American States, American Convention on Human Rights, OAS General Secretariat (Original Instrument and Ratifications) <<http://www.cidh.org/Basicos/English/Basic4.Amer.Conv.Ratif.htm>> accessed on 10 February 2015.

²³⁷ IACtHR, *Sawhoyamaya Indigenous Community v Paraguay* Series C No 146 (n 104). See also, case of the Yakye Axa (n 107); and the IACtHR decision in *Kichwa Indigenous People of Sarayaku v Ecuador* Series C No 245 (27 June 2012).

lands amounted to a violation of the right to life.²³⁸ Hence, the IACtHR takes the view that States have both positive and negative obligations in respecting the right to life:

[i]n order for this positive obligation to arise, it must be determined that at the time of the occurrence of the events, the authorities knew or should have known about the existence of a situation posing an immediate and certain risk to the life of an individual or of a group of individuals, and that the necessary measures were not adopted within the scope of their authority which could be reasonably expected to prevent or avoid such a risk.²³⁹

As there was no effective remedy or system through which individuals could claim redress for violations of their human rights under Peruvian law during the Fujimori Government, the Inter-American Commission (IACommHR) was expected to play an important role in the redress of the indigenous and rural communities that were impacted by Peru's sterilisation programme.²⁴⁰ However, one significant limitation of the Commission is that it can issue recommendations but not binding decisions.²⁴¹ It should be noted, however, that after consideration by the Commission the presumed victims may request that their case be submitted to the Court.²⁴²

In the *Mamerita Mestanza Chavez* case, the IACommHR found Peru responsible for the forceful sterilisation and death of the victim as a result of the operation.²⁴³ Following this decision, a 'Friendly Settlement' was signed in August 2003 by Peru and the victim's family. In this agreement, the Government acknowledged international legal responsibility, and agreed for the first time to compensate victims of the programme (Mestanza's surviving husband and children) and agreed to modify and implement recommendations made by Peru's Human Rights Ombudsman. However, the agreement does not foresee compensation for other victims. This Friendly Settlement helps to explain why the agreement has not reached the Inter-American Court.²⁴⁴ Although Peru withdrew its acceptance of the Court's jurisdiction in 1999, it was renewed in 2003.²⁴⁵ Despite the fact that the IACommHR has taken up the cases of over 200 women sterilised

²³⁸ See *Mayagna (Sumo) Awajitjuna Community v. Nicaragua*, IACtHR Series C No. 79 (31 August 2001) and *Moiwana Community v. Suriname*, IACtHR (8 February 2006). See also, Pereira and Gough (n 5) 491-492.

²³⁹ *Sawhoyamaxa Indigenous Community of the Exert People v Paraguay* (n 104) para 155. *ibid.*

²⁴⁰ For example, a 2000 country-specific report focuses on discriminatory practices against women and reproductive health in Peru; See IACommHR, 'Second Report on the Situation of Human Rights in Peru' (2000) Chapter VII <www.cidh.oas.org/women/chapter7.htm> accessed 15 February 2015.

²⁴¹ See also, F MacKay, 'Indigenous Peoples' Rights and the Jurisprudence of the Inter-American Human Rights System' in Thomas Sikor and Johannes Stahl (eds) *Forests and People: Property, Governance, and Human Rights* (Earthscan 2011).

²⁴² American Convention on Human Rights, article 51 (1).

²⁴³ IACommHR, Case 12.191. Report no. 66/00 *Mamerita Mestanza Chavez*. Yet the Inter-American Commission did not recognise in this case that the "Voluntary Surgical Contraception" program was part of a wider program of eugenics-based population control. See also, Vinodh Jaichand and Ciara O'Connell, 'Bringing it Home: The Inter-American System and State Obligations using a Gender Approach Regionally to Address Women's Rights Violations Domestically' (2010) 3 *Inter-American & European Human Rights Journal* 49, 68.

²⁴⁴ American Convention on Human Rights, art 48(1)(f), art 49 and art 50.

²⁴⁵ See IACommHR, 'Remarks by the Chairman of the Inter-American Commission on Human Rights

under the Fujimori-era program and recommended their compensation,²⁴⁶ at present *Mestanza* is the only case that has led to compensation to a victim, although other deaths have been reported.²⁴⁷ These are, however, only some of the most damaging consequences of the Peruvian sterilisation programme, and compensatory remedies must also to be available to other victims. Moreover, the IACtHR has upheld the principle of prior, free and informed consent in other cases involving allegations of forced sterilisation.²⁴⁸

It should also be noted that the *Mamerita Mestanza Chavez* case is an exceptional one in which the right to health was the central issue in a complaint brought before the IACommHR for violation of indigenous rights, without there being a closer link with the indigenous right to land and property. One explanation for this is connected to the fact that the ACHR does not explicitly protect the right to health, although this right could be regarded as integral to the promotion and fulfillment of the civil and political rights enshrined in the Convention.²⁴⁹ Indeed, the Court applied this reasoning when it drew connections between a reproductive health right and the rights to privacy and family life in the *Artavia Murillo et al v. Costa Rica* case concerning the ban by Costa Rica on in-vitro fertilization (IVF).²⁵⁰ The Court found Costa Rica in breach of the ACHR, ruling that the State's ban on IVF violated the rights to privacy, to liberty, to personal integrity, and the right to form a family, in conjunction with the right to be free from discrimination.²⁵¹ The Court concluded that there were less restrictive ways to accomplish the State's objective and to reconcile the interests at stake.²⁵² The Court finally held that the outright ban on the practice of IVF constituted an arbitrary interference and a restriction incompatible with the ACHR on the exercise of the right to a private and family life in article 11.²⁵³

In *Xakmok Kasek community*,²⁵⁴ the Court's reasoning was not limited to a consideration of allegations of violations of indigenous peoples' property rights. Indeed, the Court examined whether Paraguay had violated the provision of basic services, including health services, with respect to the State's obligation to protect the right to life. The Court held that there was a violation of the right to medical care as the State 'had not

Robert Kogod Goldman, at the Opening of the 104th Regular Session' (21 September 1999); and IAtHR, 'Annual Report of the Inter-American Court of Human Rights 2003' (IACtHR 2004) 19. See also Vinodh Jaichand and Ciara O'Connell (n 243).

²⁴⁶ See US Department of State, *US Department of State Country Report on Human Rights Practices 2003 - Peru* (25 February 2004) <<http://www.unhcr.org/refworld/docid/403f57cd4.html>> accessed on 10 February 2015.

²⁴⁷ See 'Peru's sterilisation victims still await compensation and justice' *The Guardian* (London, 17 June 2011). It reports that 'eighteen other patients reportedly died during the programme'.

²⁴⁸ See Report N° 40/08 Petition 270-07 Admissibility I.V.Bolivia (23 July 2008) paras 80-81.

Report No 52/141 Petition 112-09 Admissibility F.S.2 Chile (21 July 2014)

²⁴⁹ See Ciara O'Connell, 'Litigating Reproductive Health Rights In The Inter-American System: What Does A Winning Case Look Like?' (2014) 16 (2) Health and Human Rights Journal 119.

²⁵⁰ In July 2011, the IACommHR submitted the case to the IACtHR.

²⁵¹ *Artavia Murillo Et Al. ("In Vitro Fertilization") V. Costa Rica* Judgment, IACtHR (28 November 2012) (Preliminary objections, merits, reparations and costs) para 317 <http://www.corteidh.or.cr/docs/casos/articulos/seriec_257_ing.pdf> accessed 10 February 2015.

²⁵² *ibid* para 273.

²⁵³ *ibid* paras 142 and 145.

²⁵⁴ See *Xakmok Kasek Indigenous Community v. Paraguay*, IACtHR, Case 12, 420 (24 August 2010).

guaranteed physical or geographical access to health care establishments for the community.²⁵⁵

Within the African human rights system, the African Court on Human Rights²⁵⁶ is yet to decide on a case involving indigenous peoples' rights.²⁵⁷ Moreover, the African Commission on Human and Peoples' Rights has dealt with only a few cases regarding indigenous peoples' rights,²⁵⁸ but none of these have dealt specifically with reproductive health rights. The right to indigenous peoples' health more broadly was addressed in the *Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria*.²⁵⁹ In this case Nigeria was found to have violated several articles of the African Charter for violating the health rights and livelihood of the Ogoni people.²⁶⁰ This case concerned the negative health and environmental impacts of oil exploration in Ogoniland and the contamination of water with lead and mercury affecting community health, particularly that of the children. The Commission called for compensation to victims of human rights violations — including relief and resettlement assistance to victims of government raids — and comprehensive clean-up of lands and rivers damaged by oil operators.²⁶¹

The African Union's legal framework could more specifically protect indigenous peoples' reproductive health rights, in particular since the adoption of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa.²⁶² The Protocol recognises 'health and reproductive rights' for women in Africa including 'the right to control fertility' and 'the number of children and spacing of children.'²⁶³ In this regard, the African Commission has expressed concerns over States' failure to implement their obligations under the Protocol. In particular it has condemned the practice of forced female circumcisions in many States and expressed concerns about the problems relating to reproductive health care and the quality of services available to women in Africa.²⁶⁴

²⁵⁵ Carla Clarke, 'Litigating the right to health for indigenous peoples' in Beth Walker (ed), *State of the World's Minorities and Indigenous Peoples* (Minority Rights Group International 2013). Inter-American Court of Human Rights, *Case of Xakmok Kasek Indigenous Community v. Paraguay*, Judgment of August 24, 2010, *ibid*. See also, *Mapuche Paynemil and Kaxipayi Communities v. Argentina*, Inter-American Commission on Human Rights, Case N° 12.010, 5 February 2013. Other cases before the Inter-American Commission relate to the right to safe abortions. See for example, IAComHR, *Paulina Del Carmen Ramirez Jacinto v Mexico*, Report n 21/07, Petition 161-02, Friendly Settlement, 9 March 2007).

²⁵⁶ As of March 2014, only Burkina Faso, Ghana, Malawi, Mali, Rwanda, Tanzania and Republic of Cote d'Ivoire have made this declaration.

²⁵⁷ The Court has at the time of writing decided on 22 cases, out of 27 applications. 'Status of Applications Received By The Court' <<http://www.african-court.org/en/index.php/2012-03-04-06-06-00/cases-status1>> accessed 10 February 2015.

²⁵⁸ See Xanthaki (n 97).

²⁵⁹ African Commission on Human and Peoples' Rights, Communication No 155/96: *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria*, 30th sess (27 October 2001) 56 ('Ogoni').

²⁶⁰ *ibid* 68–69. See also, Pereira and Gough (n 5) 493–494.

²⁶¹ See also, *Africa Commission Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council Versus Kenya*; 276/2003.

²⁶² *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa*. Adopted by the 2nd Ordinary Session of the Assembly of the Union (Maputo, 11 July 2003). See also, section 4.3. above.

²⁶³ See Article 14 of the Protocol.

²⁶⁴ See The African Commission, '110: Resolution on the Health and Reproductive Rights of Women in Africa. The African Commission on Human and Peoples' Rights', meeting at its 41st Ordinary Session in

5.2.3. International and National Criminal Courts

The more serious and abusive violations of indigenous peoples' fundamental reproductive rights could also potentially be established as international crimes. As such there is potential to engage the criminal liability of State officials and others acting on behalf of the State before the International Criminal Court (ICC). The ICC's jurisdiction established by the Rome Statute,²⁶⁵ arises automatically over international crimes committed in a State party or by a national of a State party. Sterilisation programmes that target one specific group could amount to acts of genocide and to a violation of Article 2 of the UN 1948 Genocide Convention and Article 6 of the Rome Statute, thus potentially attracting the ICC's jurisdiction. The Genocide Convention prohibits 'measures intended to prevent births within a group' with 'intent to destroy, in whole or in part, a national, ethnical, racial or religious group.'²⁶⁶ Australia's removal of aboriginal children from their families violates Article 2 (e) of the Genocide Convention, as well as Article 6(e) Rome Statute, which prohibits 'forcefully transferring children from one group to another group.'²⁶⁷ However, the crime of genocide requires evidence of specific 'intent to destroy (...) a group', which has proved difficult to establish in specific cases.²⁶⁸ Although they appear to meet the *actus reus* element of the crime, it would be challenging for the ICC Prosecutor to establish that these coercive assimilationist policies intended to 'destroy a group', unless the law evolved to recognise and criminalise more broadly acts of 'cultural genocide.' It must be noted that although Australia is a party to the ICC, the Rome Statute only applies to crimes occurring after its entry into force in 2002.

In relation to the Peruvian family planning programme, criminal investigations into it were terminated by the Peruvian chief prosecution services in 2009. The public prosecutor in charge of the investigations decided that the over 2,000 registered cases of forced sterilisation did not constitute a severe violation of human rights and thus the statute of limitations prevented criminal investigations.²⁶⁹ However, formal criminal investigations were reopened by the Attorney General in 2011, in which it is suggested that the violations amounted to crimes against humanity and, therefore, that the alleged offences are not covered by the statute of limitations. In an apparent misinterpretation of the rules of international criminal law, in January 2014 the prosecutors closed the case as it was argued that 'crimes against humanity' only fit the situation of Mamerita Mestanza Chavez (who died during the operation). At the time of writing, no criminal prosecutions

Accra, Ghana, from 16 to 30 May 2007.

²⁶⁵ Rome Statute of the International Criminal Court (adopted 17 July 1998; entry into force 1 July 2002) A/CONF.183/9 37 ILM 1002.

²⁶⁶ UN Convention on the Prevention and Prohibition of the Crime of Genocide, adopted by Resolution 260 (III) A of the UN General Assembly on 9 December 1948, Article 2 (e).

²⁶⁷ Forced sterilisation is specifically referred to in Art 7 (g) of the 1998 Rome Statute. See Rome Statute (n 265).

²⁶⁸ See Antonio Cassese, *International Criminal Law* (OUP 2003) 96. See further, Philippa Webb, 'Binocular Vision: State Responsibility and Individual Criminal Responsibility for Genocide', in Larissa van den Herik and Carsten Stahn (eds) *The Diversification and Fragmentation of International Criminal Law* (Martinus Nijhoff 2012).

²⁶⁹ Emilee Gaebler, 'Thousands of Forced Sterilization Cases Reopened in Peru' (14 November 2011) <<http://impunitywatch.com/thousands-of-forced-sterilization-cases-reopened-in-peru/>> accessed 15 February 2015.

have been brought against State officials or the health practitioners involved in the Peruvian programme.²⁷⁰ This decision by the public prosecutor is in direct violation of the Friendly Settlement reached in the *Mamerita Mestanza Chavez* case, in which the Peruvian Government undertook to investigate and punish those responsible for the reproductive health violations.²⁷¹

5.2.4. Reparations, reconciliation and redress under national law

Beyond the liability of the State and individuals for human rights violations as recognised by international and regional courts, the role of national court systems cannot be understated. In this context, in a landmark ruling in 2007, South Australia's Supreme Court awarded compensation for the first time to a 'Stolen Generation' victim.²⁷² This decision opened the way for a number of other legal actions (some of which are still ongoing) claiming reparations for the 'Stolen Generation' before Australian courts.²⁷³ Another notable development is the legislative proposal for a South Australia Stolen Generation (Compensation) Bill 2014.²⁷⁴ The Bill foresees the reparation of indigenous Aboriginal and Torres Strait Islander peoples removed from their family as children, including the payment of compensation (in line with the recommendation of the 'Bringing them home' report²⁷⁵) to individual Aboriginal and Torres Strait Islander persons removed from their families as children under previous government policies to of a lump sum of up to AUS\$50,000.²⁷⁶ The focus on monetary compensation under this Bill sets it in contrast with the earlier 2010 Stolen Generations Reparations Bill, which recognised a broader range of reparation measures. That earlier Bill foresaw reparation measures such as funding for healing centres, community education projects, community genealogy projects, and funding for access to counselling services, health services, language and culture training.²⁷⁷ Moreover, the current draft of the 2014 Bill foresees the monetary compensation of descendants of an Aboriginal removed from his or her family, but not for other family members and parents (in cases where this would still be technically possible) who have suffered harm as a consequence of the removal.²⁷⁸ This would have recognised the fact that the government-sponsored child removal policies

²⁷⁰ Mariella Sala, 'Forced sterilization and impunity in Peru' (10 February 2014) <<http://www.opendemocracy.net/5050/mariella-sala/forced-sterilization-and-impunity-in-peru>> accessed 10 February 2015)

²⁷¹ In line with 'the third obligation' under the "Friendly Settlement" agreement (2003). This suggests that the *Maria Mamirita Mestanza Chivez v. Peru* case could be referred, in principle, to the Inter-American Court for violation of the original friendly settlement.

²⁷² 'The Agony of Australia's Stolen Generation' *BBC News* (9 August 2007) <<http://news.bbc.co.uk/1/hi/world/asia-pacific/6937222.stm>> (accessed 10 February 2015).

²⁷³ For a discussion, see Lino Dylan, 'Monetary Compensation and Stolen Generations: A Critique of the Federal Labor Government's Position' (2010) 14(1) *Australian Indigenous Law Review*. On the question of reparations for violations of indigenous peoples rights generally, see Federico Lenzerini (ed), *Reparations for Indigenous Peoples: International & Comparative Perspectives* (OUP 2009).

²⁷⁴ Stolen Generation (Compensation) Bill 2014, House of Assembly – no 55, 4 December 2014.

²⁷⁵ Bringing them Home report (n 64) part 4.

²⁷⁶ See also, the previous Stolen Generations Reparations Tribunal Bill (2010) clause 29 (formally withdrawn).

²⁷⁷ *ibid*, clause 28.

²⁷⁸ Clause 8 of the 2014 Bill, *supra*. Compare it with *ibid*, clause 19 (c).

were particularly traumatic to the families. It would also be in line with the '*Bringing them Home*' report recommendations.²⁷⁹ The Bill is currently being debated by the Australian Parliament - if adopted, South Australia will be the second Australian state to set up a tribunal to compensate the 'Stolen Generation' victims.²⁸⁰

Reconciliation can play an important role in healing wounds from past crimes, as applied in the case of truth and reconciliation commissions.²⁸¹ Even though Peru has set up a Truth and Reconciliation Commission with the purpose of '[...] clarifying the process, facts and responsibilities of the terrorist violence and human rights violations produced from May 1980 to November 2000 [...]', the Commission has been criticised for failing to address the state-sponsored sterilisation programme that took place between the mid to late 1990s.²⁸² In contrast, Australia has not set up a such a commission.

A significant development happened in 2008 when Kevin Rudd, then Australian Prime Minister, apologised for the tragedies suffered by aboriginal families of the 'Stolen Generation', breaking with his predecessor's disregard for this issue.²⁸³ The apology is not only symbolically significant, as the more concrete measures for reparation of indigenous peoples have been proposed subsequently in the *South Australian Stolen Generations Reparations Tribunal Bill* (2010) and the *South Australian Stolen Generation (Compensation) Bill* (2014).²⁸⁴ Another positive development came in April 2009, when Rudd's Government endorsed the UNDRIP, despite Australia's vote against it in the General Assembly under the former Howard Government.²⁸⁵ It has been recognised that the apology was only a 'first step by acknowledging the past and laying claim to a future that embraces all Australians',²⁸⁶ and as Jenny Macklin, who was then the Minister for Families, Housing, Community Services and Indigenous Affairs has reportedly put it: 'we have serious inequalities between indigenous and non-indigenous Australians. The apology is symbolic, but there's a lot of hard work to be done to reverse those inequalities.'²⁸⁷ Indeed, indications that considerable work lies ahead are the suggestions that aboriginal child removals still currently happen under Australian welfare

²⁷⁹ *Bringing them Home* report (n 64) part 4, recommendation 4.

²⁸⁰ In Tasmania, a compensation scheme was introduced in 2008. It has been suggested that \$5 million would be due for the estimated 106 Tasmanian Aborigines removed from their families. See Sarah Martin, 'Compo 'must come soon for Stolen Generations' *The Australian* (2 April 2012).

²⁸¹ As in the case of South Africa Truth and Reconciliation Commission. See generally, Susan Kemp, 'Alternative Justice Mechanisms, Compliance and Fragmentation of International Law', in Larissa van den Herik and Carsten Stahn (eds) *The Diversification and Fragmentation of International Criminal Law* (Martinus Nijhoff 2012).

²⁸² See Jocelyn E Getgen, 'Untold Truths: The Exclusion of Enforced Sterilizations from the Peruvian Truth Commission's Final Report', (2009) 29 *Third World Law Journal* 3. She further notes that '[t]hough the Peruvian government has issued a public apology for its mass sterilization campaign, excluding these cases from any commission of inquiry greatly reduces the possibility of individual accountability for the perpetrators and justice for the victims of enforced sterilizations in Peru'

²⁸³ See Ian Anderson 'The End of Aboriginal Self-Determination?' (2007) (39) *Futures* 137.

²⁸⁴ *Bringing them Home* report (n 64).

²⁸⁵ Hon Jenny Macklin MP, Minister for Families, Housing, Community Services and Indigenous Affairs Parliament House, 'Statement on the United Nations Declaration on the Rights of Indigenous Peoples' (Canberra 3 April 2009).

²⁸⁶ See CNN, 'Full Text of Australia's Apology to the Aborigines' (12 February 2008) <<http://edition.cnn.com/2008/WORLD/asiapcf/02/12/australia.text/index.html>> accessed 15 February 2013.

²⁸⁷ *ibid.*

legislation²⁸⁸ and that maternal and infant mortality rates for indigenous women and children in Australia are still much higher than the national average.²⁸⁹

In this regard, Julia Gillard, former Prime Minister, apologised on 21 March 2013 for another Government policy from the 1950s to 1970s that led to thousands of unmarried young mothers who were coerced or deceived into giving up their babies to adoption by married couples.²⁹⁰ It will be interesting to follow how the Government's subsequent response to the apology for these past policies, which were applicable to Australian women irrespective of ethnicity, will compare to the reaction that followed the Government's apology to the 'Stolen Generation.'

This review of the jurisprudence of international courts and UN treaty-monitoring bodies, as well as of two regional human rights systems, suggests that under international law States have an obligation to ensure the protection of indigenous peoples' reproductive rights and that States can be held liable for their failure to protect these rights. Moreover, international, regional and national courts and procedures have played important roles in recognising the right to reparation schemes and a measure of redress from past government policies violating indigenous peoples' reproductive rights. The *Guerrero and Oaxaca* case before the ILO Compliance Committee is particularly significant. The significance of this case stems from the fact that it illustrates the role that international human rights law can play not only in addressing the reparation of victims and their relatives (as in the *Mamerita Mestanza Chavez* case before the IACommHR), but also to condemn - and potentially end - an existing national policy of population control that violates indigenous peoples' reproductive rights.

6. CONCLUSION

The oppressiveness of post-colonial State systems has confronted indigenous peoples with the terrifying prospect of *inter alia* genocide, birth control and sterilisation programmes. As such, what type of governmental system is necessary to accommodate indigenous claims for some degree of independence in order to rule their own communities and enable them to control their fertility? The right to reproductive freedom is a fundamental tool for indigenous peoples to decide their own reproductive strategies. There are grounds for concern that rapid population growth in some continents (such as Africa) and forced migration arising from environmental factors, could lead to the reassertion of coercive national population policies (as in the case of China's one-child policy), and that these policies could impact disadvantageously on indigenous peoples (as well as minorities). This is so not only because population policies tend to be top-down

²⁸⁸ See Larissa Behrendt, 'Consent in a (Neo) Colonial Society: Aboriginal Women as Sexual and Legal 'Other'', (2000) 15 (33) Australian Feminist Studies 353.

²⁸⁹ In 2001, the age-standardised rates of death for Indigenous Australians were between two to four times that of non-Indigenous Australians. See Anderson (n 283).

²⁹⁰ 'Julia Gillard apologises to Australian mothers for forced adoptions', *The Guardian*, (21 March 2013) <<http://www.guardian.co.uk/world/2013/mar/21/julia-gillard-apologises-forced-adoptions>> accessed 10 February 2015. See further, 'Commonwealth Contribution to Former Forced Adoption Policies and Practices' (29 February 2012); and the government response, available at <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/Completed_inquiries/2010-13/commcontribformerforcedadoption/index> accessed 10 February 2015.

and disregard the rights of minorities, but also because the institutionalisation of these policies may have a racist or discriminatory intent. International and national human rights law play a central role in giving effect to the right of reparation to indigenous peoples that have suffered violations of their reproductive autonomy from past government-sponsored policies.

Recent history and events have shown that forceful birth control programmes can pose a significant threat to indigenous peoples. The long-term survival and generational continuity of distinctive ethnic and cultural groups requires that there is effective protection of their reproductive health rights, in particular in countries such as Peru and Australia where there has been well-documented evidence of violations of indigenous peoples' reproductive rights. These rights must also be recognised and made effective under international human rights law. While securing reproductive autonomy may pose an even bigger challenge for coming generations of indigenous peoples in light of future challenges including dislocation and climate change, the main threat to indigenous peoples' survival arises from national policies that disregard their right to health more broadly, including policies that are complacent or condone the invasion and expropriation of their lands.

Certainly the dispossession of indigenous lands and the impact that this has on their health pose a major threat to their survival in many parts of the world. Therefore, the right to life and to health of indigenous peoples need to be effectively protected and must be made enforceable under international human rights law. This is recognised under the 1994 Plan for Action Programme, emphasising that population policies impacting indigenous peoples need to be considered within the broader context of indigenous peoples' fundamental rights, including the right to health, to land and to natural resources.²⁹¹ Although States have renewed their commitment to improving women's reproductive health and to strengthening indigenous peoples' rights in the 2014 ICDP (Cairo+20), it is notable that a number of States did not declare the protection of reproductive health rights for indigenous women to be a current priority.

Yet it is the indigenous identity and the survival of distinctive indigenous cultures that may be the biggest long-term threat for indigenous peoples, in particular government policies that aim to assimilate them. Some of these assimilationist policies may in fact be part of a family planning programme, as in the case of the Aboriginal child removal policies in Australia. Therefore, it is crucial that indigenous traditional cultures and languages that have evolved over centuries are also effectively protected under international law.²⁹² The perception of 'indigeneity' by broader society and indigenous peoples themselves, defines the contours of the relationship between cultural identity, population politics and human rights.

This paper concludes that the right to reproductive health must be seen as an integral part of the right to self-determination and to health under international law, which delineates the degree of autonomy of indigenous peoples to self-government,

²⁹¹ 1994 Plan for Action Programme, 6.21 (n 24)

²⁹² See Siegfried Wiessner, 'The Cultural Rights of Indigenous Peoples: Achievements and Continuing Challenges' (2011) 22 *European Journal International Law* 1. On the other hand, it is rightly suggested that it is not for human rights law to advocate that indigenous cultures are kept 'frozen in time', but to allow indigenous peoples to develop in their own way and protect their right to enjoy their own traditional culture. See also, Pereira and Gough (n 5).

including reproductive strategies. Moreover, the right to indigenous peoples' reproductive autonomy must be given effect by procedures for prior and informed consent and to consultation in the context of family planning programmes. These rights must be recognised in the post-2015 Millennium Development Goals framework. The right to self-determination, to health and to prior and informed consent provide the essential legal basis that must be made enforceable under international law in order for indigenous peoples to triumph over assimilationist and other neo-colonial practices – of which forceful child removal policies and birth control programmes are just some of the unfortunate examples.